Law Reform Commission of Canada
Commission de réforme du droit du Canada

ADMINISTRATIVE LAW

the legal status of the federal administration

Working Paper 40

Canada

THE LEGAL STATUS OF THE FEDERAL ADMINISTRATION

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Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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For my part, and with respect for the contrary view, I consider that this old notion of royal immunity cannot be reconciled with our modern understanding of a democratic state and of the right of every citizen to be equal before the law.

Hugessen J. in *C.I.A.C.* v. *The Queen*,
Federal Court of Appeal, July 12, 1984.

[TRANSLATION]
Administrative law is not, and cannot be, an area of law like any other ... for it is an integral part of the study of political science which is concerned with the problems raised by relations between Government and the citizen, authority and freedom, society and the individual.

P. Weil, *Le droit administratif.*

Introduction

Following a recommendation contained in Working Paper 25, entitled *Independent Administrative Agencies* (L.R.C.C., 1980), the Law Reform Commission recently decided to undertake a review of the legal status of the federal Administration.* Research along these lines is in keeping with the Commission's fundamental concerns regarding the clarification and reform of federal administrative law. However, events on the political scene have provided more timely justification. The patriation of the Constitution has inaugurated an era in which Canada, now sovereign, is able to develop a public law fully suited to the needs of our time. Accession to sovereignty calls for a review of the legal means enabling the Government and the entire Administration to formalize their special pre-eminence. Defects which appear to be unacceptable in light of current trends in the law also justify the timeliness of this Working Paper.

This research is in the unusual position of being able to justify itself almost without further reference to any external consideration. Quite apart from reasons connected with social or political developments, two major problems make a thorough review of the legal status of the federal Administration desirable.

The first of these originates in a lack of legal unity. For historical, legal and structural reasons, a large part of the federal Administration is associated with the legal regime of the Crown, which allows it to benefit from powers, privileges and immunities which are generally exceptional. The rest of the Administration is subject in principle to the ordinary rules of the common law or the civil law. This has the effect of placing it on an equal footing with private individuals. The federal Administration is thus subject to a dual system, the only justifications for which are unfortunately history and continued legislative improvisation. Most often, subjective judgments or political factors are responsible for the statutory promotion of certain offices or agencies to the rank of Crown agent. When the legislator has not been sufficiently precise as to the status of such bodies, the courts have often been forced to undertake the delicate operation of determining what rules will apply to them. Over a period of time, in the absence of any general solution, the federal Administration has become a complex mosaic of particularized regimes. This is especially difficult for the public, which is often unable to determine the legal status of the unit with which it must deal. Additionally, a widening discrepancy between the status of certain bodies and the nature of their activities raises urgent questions as to the coherence and relevance of this dualism. There may not appear to be any immediate reason why certain public enterprises engaged in activities of an industrial or commercial nature should benefit from the legal position of the Crown, while others, performing functions which are essentially public in nature, cannot claim any special status.

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* The term "Administration" is used in this translation to refer to the administrative apparatus of the Federal Government — TR.

The second problem concerns the failure of this status to move with changing times. The legal position of the Crown has its roots in a period when a different logic applied to relations between the State and the individual. Today, the Crown continues to represent a legal reality endowed with many privileges, powers and immunities that are difficult to reconcile with the ideals of a society concerned about equality and democracy. As it is the Administration which chiefly benefits from these exceptions to ordinary law, the Crown at once moves beyond this historical dimension to take its place among current issues. In this context, additional rights and safeguards are being claimed for individuals in their dealings with the Administration. Thus, if such individuals are to be granted, or if they assert, a right to information and to confidentiality, to be given reasons for administrative actions, to consultation and participation, and to safeguards, whether curial or not, at various stages of an administrative proceeding, many of the privileges and prerogatives enjoyed by the federal Administration will quickly appear to be anachronisms:

> [TRANSLATION]
> All of this machinery, with its advantages for the Government, is both anti-democratic and outmoded at a time when Governments are responsible for some forty per cent of the country's economic activity. (Tremblay, 1982: 77)

Has it become necessary to initiate radical changes in order to dispose of what has become obsolete?

While the need for a critical examination of the existing situation is becoming increasingly apparent, the complexity of the subject is such that action should not be taken too hastily. Caution and the desire to ensure a minimum of accuracy in our analysis mean that we must take a step back. The time is ripe for fundamental consideration of this issue.

At this preliminary stage, it may be observed that an analysis of the legal status of the federal Administration overlaps with that of the Crown itself, as these two entities are partly merged with each other. The resulting confusion has always considerably impeded any clear and coherent analysis of the situation. At the outset, therefore, the Commission was confronted with several major problems, not only in attempting to differentiate between these two realities, but also in developing a research programme taking into account the problems inherent in the concept of the Crown. Its privileges and immunities have always constituted a formidable challenge to legal analysis. Any examination of the Crown's legal position must necessarily cover a wide area of administrative law, since this institution is the source of special rules in tortious liability, contracts, procedural privileges, Crown privilege, immunity from suit, the public domain, recovery of debts, the applicability of statutes, execution of judgments and so on. The Crown thus appears as the linchpin in developing a rational presentation of the principal legal factors most directly affecting the Administration.

Although an initial understanding of the significance and ambivalence of this duality between the Crown and the Administration helps to define the limits of this research, several difficulties remain. First, the complexity and immensity of this subject preclude the development of concrete proposals for change in the short term. In order to cover

the entire subject-matter, we have had to adopt an incremental approach. The complexity inherent in each of the privileges or immunities of the Crown requires a series of specialized studies. However, a preliminary analysis remains necessary, if only to clarify certain fundamental points, outline a research program and avoid repetition. Hence this overview, which is intended to lay the groundwork for current and future research. It can be used to formulate general principles and to develop a true theory of administration. The intention at the outset was not to present concrete proposals for reform, but to leave these to the writers of specialized studies.

Other problems make a discussion of this kind necessary. Currently no comprehensive study of this subject exists in either Canada or the United Kingdom; this complicates matters considerably in arriving at a coherent and precise perception of this area of public law. In particular, almost no general theoretical explanation exists for these privileges and immunities. So far, legal analysis has been devoted to descriptive classification rather than any general assessment with a view to change. No doubt there is a certain feeling of helplessness, in view of the abstract nature of the subject-matter and the extensive research needed to clarify the confusion in this area. The situation is made even worse by a formidable initial difficulty, that of correctly defining the concept of Crown for the purposes of administrative law. At this stage of the research, therefore, we feel it is important to leave aside mere descriptive cataloguing and attempt to resolve certain conceptual issues, thus suggesting a framework for analysis in accordance with a general philosophy.

The Commission does not intend by this general approach artificially to devise a new theory of the State or of the executive function. On the contrary, this is to be a statement of the present position, a basis for proposing a new status for the federal Administration, that would be better suited to the legal and social circumstances of Canada, adopting an outlook which is not limited to traditional law. In doing this, we need not for the moment resort to political, sociological or economic analyses as such. In varying degrees, legal analyses reflect the Canadian reality. Even within these limits, it is still possible for us to step back in an attempt to list all the legal factors that may affect the legal status of executive function. The source of these factors is still sufficiently uniform to suggest certain general principles in relation to the state of contemporary public law. Any general observation is certainly not free from methodological difficulties, in view of the vastness of the subject-matter and its heterogeneous nature. On the other hand, a long and detailed exegesis of each privilege would probably produce only a list of particular pictures without any common thread.

This fundamental reflection is all the more necessary as the existing dualism offers a choice. Since part of the Administration is not subject to any special rules, the question arises whether this solution should be further extended, or whether it should be regarded as unsuited to administrative necessity. Such a choice could not be properly made on the basis of an analysis limited to discrepancies within the existing system. The Administration is a relational entity, constantly in contact with individuals. Its status, therefore, depends largely on the nature of the relations it has with them. This indicates the need to develop a general philosophy of relations between the Administration and the individual, which

can be the basis for a much more critical reappraisal of the existing regime. As neither Anglo-Canadian nor British academic opinion has to date suggested any analysis of this type in the area with which we are concerned, the reader should not be surprised by the relative importance given to Québec writers, or by the novelty of certain points made.

The existence of apparently divergent interests does not facilitate the choice of changes which should be made to the legal status of the federal Administration. The Administration intervenes more than ever in economic and social life. These interventions require tools which are designed to deal with such wide responsibilities. Hence, special powers and privileges may be justified as a means of attaining these "public interest objectives." In the interests of the entire community, the Administration may claim to stand outside the general rule and enjoy a separate status, as the effectiveness of its actions depends on the existence of immunities and privileges. Indeed, British writers have not hesitated to state that the latter are "essential" to government action (Harvey and Bather, 1977: 228; Wade and Phillips, 1980: 234).[1] Conversely, it can be said that the trends in current law are largely favourable to expanding the rights and safeguards of individuals when confronted with administrative action. The primacy of the rights of individuals and civil liberties might lead to the conclusion that the State should be less powerful and enjoy no form of special pre-eminence over individuals.

The first part of this Working Paper will therefore be primarily descriptive, explaining the circumstances which have given rise to the present situation. It is important to understand why public law appears to ignore the fact that Canada has a highly developed governmental apparatus. The absence of a modern and coherent status for the federal Administration requires at least a minimum effort to modernize the law (Chapter One: *Absence of a Modern and Coherent Status*). Such a change can really only take place with a methodology which reconciles the apparently divergent interests of the protagonists, namely, Administration and individuals (Chapter Two: *Toward a Methodology of Change*). This is how methods more suited to the present circumstances are likely to be found, and to serve as a basis for developing a new legal status for the federal Administration. The oneness in the orientation of the specific research which the Commission intends to undertake will thus give it the necessary coherence. Accordingly, the purpose of this Paper is to lay the groundwork for such a general plan.

1. More cautiously, Foulkes, 1982: 2, notes that "[i]f the community decides that public power is necessary to achieve certain goals, then the appropriate authorities must be given the necessary powers."

CHAPTER ONE

Absence of a Modern and Coherent Status

The concept of the Crown is of crucial importance in the area under consideration, since in large measure this is the institution that provides the basis for many privileges and immunities. The common law and several statutes[2] have, by implication, recognized the special status of the Crown in right of Canada and, by association, the special status of a large part of the Administration. As the concept of Crown is derived directly from feudal society, can it be entirely suited to the context of a technological and scientific State in the late twentieth century? This refers to a long history which has seen the prerogatives of the Monarchy gradually eroded in favour of Parliament. Indeed, the use of the term "Crown" is all the more surprising, as it appears to conceal the transfer of the executive function from the person of the Monarch to a Government responsible to Parliament. Although the concept of the Crown undoubtedly has a part to play in the operation of any contemporary State in the British tradition, it represents a complex and ambiguous entity which can only take shape through a historical review (Section I: *Origins of the Current Situation*) and an attempt at demystification (Section II: *Continuing Misconceptions*).

I. Origins of the Current Situation

The legal status of the federal Administration is the result of a historical and institutional evolution which cannot be ignored when reform is considered. In Canada, the combined effect of the particular way in which British institutions have developed on the one hand, and the experience with federalism and independent administrative agencies on the other, has produced an original situation. The circumstances surrounding the development of this situation stems essentially from three principal causes. The organizational problems peculiar to Canadian federalism and to the structure of the federal Administration cannot be separated from this background of the special way in which the Crown's legal position has evolved. It is therefore necessary to consider the special significance of the Crown in the United Kingdom before examining more specifically Canadian issues.

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2. See, for example, the *Crown Liability Act* (hereinafter referred to as "the 1953 Act").

A. The Weight of Historical Tradition

The Crown is central to any analysis of administrative institutions. It is thus tempting to think that the present situation is essentially the result of history, and to discount any other explanation. The historical approach does continue to have great importance for this subject, since it enables us to understand the relative character of a legal system which is the product of a thousand years of history. However, the present situation does not appear to be exclusively the result of historical determinism, which would make any attempt at clarification and rationalization futile. With this qualification, history can play its proper role in explaining the strange paradox which has led to the Crown and a large part of the Administration being granted a special pre-eminence.

1. The Existence of a Paradox

Paradoxically, both integration and separation of powers are inherent parts of British public law. The survival of the Crown dates from a period in which all governmental functions flowed, in a more or less confused way, from the person of the Monarch. On the other hand, many institutions have evolved decisively towards a regime of separation of powers, in strict accordance with the thinking of Montesquieu. This rule can be easily verified with regard to the judiciary, which under the *Act of Settlement, 1701* was granted many rights and safeguards to ensure its integrity and independence (Hood Phillips and Jackson, 1978: 377). It is a truly separate and independent appendage of the State, although the appointment of judges and the administrative organization of the judiciary are the responsibility of the Executive (Brun and Tremblay, 1982: 513). Nevertheless, the courts are still "the King's Courts," mere extensions of royal justice.[3] As the fountain of justice, the Monarch only delegates to her courts the power to state the law and to settle disputes. On the surface, therefore, the Crown negates the principle of the separation of powers, since all governmental functions derive from the Sovereign.

(a) Survival of the Unitary Principle

Historically, royal authority resulted in an integrated State. Legislative, judicial and executive functions proceeded directly from the individual person on the throne. Even today, the Queen sits in her Parliament, the courts are the Queen's courts, the Administration is a service of Her Majesty, the Monarch is the Head of State; she is defender of the Kingdom as Commander-in-Chief of the Armed Forces, and Defender of the Faith (de Smith, 1981: 99). Many spiritual and temporal functions accordingly reside in an institution which is absolute in every sense, since it is a supreme entity in which all the functions of the State reside. This primal integration of powers dates back to the twelfth century, a period when the King succeeded in establishing his authority over feudal

3. "All jurisdictions of courts are either indirectly or immediately derived from the Crown. Their proceedings are generally in the King's name ..." (Blackstone, 1829, c. 7).

society, becoming the First Lord of the kingdom. Under the reign of the first Plantagenet, Henry II (1154-1189), in particular, an institution emerged which would have a decisive importance on subsequent developments. Like the Monarch, the *Curia Regis* performed a number of financial and judicial duties, and assumed administrative functions as well (Harding, 1973: 38; Turner, 1968: 14). It appears to have been the embryo which was later to become the Executive and the Administration in modern Britain. Accordingly, it evolved as its functions became increasingly specialized.

Although the necessities of organization and operation naturally favoured such an outcome, the coexistence of judicial and administrative functions within the same body nevertheless led to major problems. At the outset, no really clear distinction separated "the administration of justice" from the management of finances and of the royal domain.[4] All that can be said is that the former had some degree of ascendancy over the latter because of a specifically British cultural characteristic. As Bracton observed in the thirteenth century, "the king was the *judex ordinarius* of the realm, and his duty *primo et principaliter* was to judge" (Turner, 1968: 9). In addition, the independence of the judiciary was the result of a long development, since initially it merely performed a specialized function within the same body (Holdsworth, 1922: 144). Thus, under the reign of King John, justice ceased to be dispensed on an itinerant basis and was centralized in Westminster. Appeals from the common law courts came to be heard by a small number of royal judges attached to the *Magna Curia Regis*. In their efforts to handle an ever-increasing flood of appeals, these judges gradually formed a specialized group known generically as the *coram rege* (Turner, 1968: 27). This body was ultimately to become the Court of Common Pleas and the Court of King's Bench (de Smith, 1981: 141). This dualism is still to be found in the Privy Council, which contains a Judicial Committee: "the Judicial Committee of the Privy Council is in form an executive organ, but it is in fact an independent court of law" (Wade and Phillips, 1980: 50). This integration of powers is also reflected in the concept of administrative tribunals, in which the separation of administrative and quasi-judicial functions raises thorny problems (Garant, 1985: 132).

(b) Consequences of Relational Dependence with the Crown

Although British public law has undoubtedly evolved towards a system of separation of powers, this original integration of powers nonetheless inhibits modernization of this area of the law. It presents two difficulties which are far from negligible.

On an essentially theoretical level, first, it must be observed that no activity of the State is really independent of the Crown (Hood Phillips and Jackson, 1978: 31). This is of course a legal fiction, similar to the one relating to the legal status of Canada before 1982, when it could not claim to be a fully sovereign State in law, although it had become

4. "The King's administrative machine was used, not only to administer his estates, to collect his charges or, as they were called, debts, but also, to carry into execution his orders intended to settle disputes between private parties, and to administer justice in what are described as pleas of the Crown, i.e. criminal cases" (Ehrlich, 1921: 19). See also Strayer, 1979.

one in fact. Similarly, in the internal organization of the State all matters are transacted as if the Monarch were omnipresent, the real embodiment of the State in all its parts. This fact is clearly reflected in current terminology, since we readily speak of Crown lands, a Crown prosecutor, a Minister of the Crown, the Speech from the Throne, Royal Assent, the Royal Mail,[5] or simply the Crown, when we mean the Government. Not only does this constant reference to the Monarchy present problems in distinguishing all these entities from each other, but an effort is also necessary to overcome a close relational dependence with the Crown, which is reflected in filiations, privileges, immunities and exceptional powers. In the courts, for example, the contempt of court procedure can only really be explained by direct reference to the Monarch, since the judges are punishing behaviour which challenges the authority of the Queen's courts.[6] By a fiction, a contempt committed with respect to a judge is no less than an attack on the Monarch herself. Nevertheless, parliamentary and judicial functions have been clearly emancipated from Crown control (*Magna Carta, 1215*; *Case of Proclamations, 1611*; *Bill of Rights, 1689*; *Act of Settlement, 1701*). As such, they are not directly associated with the Crown, although they may be managed by it through the tabling of bills and the appointment of judges. In the case of the Government and the Administration, this differentiation has never been made, with the result that it is very difficult to conceive of executive action as an independent concept.

The second problem, directly connected to the first, results from the very impossibility of making a clear distinction between Crown and Government, Government and Administration, and Crown and Administration. In law, it is as if this trilogy were a single unit. In the first place, this is the result of history. By a series of transformations, the executive functions of the *Curia Regis* were transferred to the Council, then to the Privy Council, and finally, as the result of action by James II, who was opposed to the Privy Council, to the Cabinet (de Smith, 1981: 181). Under the leadership of Sir Robert Walpole, this Cabinet in fact became "the King's principal and trusted adviser." In this way by historical tradition and legal fiction, the Government and the Cabinet are associated directly with the Crown, and the latter personifies the Executive and the Administration above all. This is clearly shown by observations made regarding government institutions. For de Smith, the civil service is defined with reference to the officers who make it up:

> [A] civil servant is a Crown servant appointed directly or indirectly by the Crown, and paid wholly out of funds provided by Parliament and employed in a Department of government. (1981: 185)

These Departments or Offices usually have at their head a Minister of the Crown who is responsible to Parliament. The circle is thus complete. Civil servants, services, departments, Ministers and the Government are all merged in the Crown and benefit in various ways from some or all of its privileges.

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5. This term was formerly used to refer to the British post office. In Canada, this phrase was replaced by "Canada Post," which since 1981 has been the Canada Post Corporation.

6. "The courts, as agents of the King, derived their use of the contempt power in such cases from the presumed contempt of the King's authority" (Watkins, 1967: 136).

This complex situation raises two new problems for the present analysis. In terms of reform of the legal status of the federal Administration, the legal regime of the Crown is the source of many privileges and powers for a large part of the Administration. Although some of these privileges have only administrative consequences limited to administrative law for all practical purposes (special rules regarding tortious liability, the power unilaterally to dismiss officers and civil servants, Crown privilege and so on), others are more closely connected with the "public law" aspects of Government (for example, the royal Prerogative in the fields of defence and diplomatic relations). Is it then possible to make a clear distinction between what is merely administrative on the one hand, and what is specifically governmental on the other?[7] Should we not take the risk that re-evaluating the legal status of the federal Administration will require us at various points to re-examine certain powers and privileges held by the Government, for the simple reason that these two institutions are confusingly associated with the Crown? Since many privileges affect the entire executive apparatus, any possible modification of them will necessarily have repercussions on each part of the Executive.

The other problem is also a rather delicate one. In a situation in which it is the Crown which symbolizes and embodies the executive function, a study that purports to be limited primarily to privileges of the Administration must necessarily innovate and move away from tradition. In its most classic concepts, British public law leaves little room for the concept of the "Administration" as a separate entity with its own objectives; and yet, the Administration exists (to paraphrase Galileo). In functional terms and in terms of its organization and objectives, it constitutes a separate entity for purposes of law and administrative science. The Administration is thus a collection of material and human resources existing to give concrete effect to legislation, manage public services of general concern and provide assistance benefits. In Canada, the federal State has an especially large Administration which includes central units such as departments, independent administrative agencies such as commissions, offices, and boards, and certain decentralized bodies and public enterprises better known as Crown corporations.[8] The federal Administration is thus a distinct and tangible reality. It is the Administration understood in this way that we will refer to in this Working Paper, without direct and constant reference to the position it holds with respect to the Crown. In English, the phrase "public administration" exists to refer to what is described as *l'Administration*

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7. [TRANSLATION]
"Even if a distinction is discernible between Government and the Administration, between the governmental and the administrative functions, the fact remains that in practice anyone who attempts to identify the rules governing the organization and operation of governmental and administrative institutions is faced with a body of rules among which it is difficult to distinguish what applies to the Government and what to the Administration" (Garant, 1985: 2).

8. Although this fact tends to be misunderstood, public enterprises are also part of the Administration. Indeed, in *British Columbia Development Corporation* v. *Friedmann (Ombudsman)*, [1984] 2 S.C.R. 447; (1984), 55 N.R. 298, the Supreme Court held:

> There is nothing in the words administration or administrative which excludes the proprietary or business decisions of governmental organizations. On the contrary, the words are fully broad enough to encompass all conduct engaged in by a governmental authority in furtherance of governmental policy - business or otherwise. (Dickson J. 36 (S.C.R.); 311 (N.R.))

in the other Western cultures. The increasing use of the phrase "administrative law" to refer to the law applicable to public services makes the reference to their public nature superfluous.

Despite all the confusion which still surrounds the concept of the Crown, therefore, the Administration can, for administrative law purposes, be the subject of a study dealing specifically with its status and the rules applicable to it. This is still a difficult undertaking, since historical tradition requires constant reference to the Crown, which holds a very ambiguous position within the State. This institution, conceived and designed by canon lawyers (especially at Oxford, Paris and Bologna), is increasingly ill-adapted to the technological and scientific State of the late twentieth century. Despite historical vicissitudes, however, the Crown continues to provide a special pre-eminence to all the institutions directly linked to it.

2. Transfer of Special Pre-Eminence

To the unwary observer, the Crown may give the impression of being a curiosity without real consequences, merely a reflection of the attachment of public law to British tradition. In reality this institution cannot have a neutral role, since it still embodies a very special concept of the executive branch. It makes possible a continuance of the royal pre-eminence over the functions or bodies directly associated with it. For the Administration, this has two specific consequences.

Despite Dicey and the tradition influenced by him, the fact is that the present situation partly or entirely negates the concept of the rule of law. In its strictest sense, this rule is that only Parliament and the courts can of their own initiative alter the law applicable to individuals (Dicey, 1959: 193). In such a system, the Administration in theory has no special powers, as it remains subject to Parliament and review by the courts. It thus occupies a lower place in the hierarchy than the foregoing bodies, and is given no special status under public law (Garner, 1929; Robson, 1952). This is in contrast to the Continental tradition of administrative law, where the Administration has a separate existence, and it is thus possible to make administrative law a truly independent area of study (David, 1980: 81; de Laubadère, 1983: 27). British law has declined to follow this route, placing special emphasis on freedoms of individuals, which could only be guaranteed by Parliament and the courts.[9] In theory, the purpose of British public law is to limit the powers of the Administration, so far as possible, in order to ensure compliance with certain political values.[10]

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9. On the influence of the ideas of Dicey, see, in particular, Distel, 1971: 364.

10. This fundamental concern also appears clearly from reading British writers who put particular emphasis on the themes of "control," "powers" and "limits." See, in particular, Garner, 1979: 25, who clearly associates the purpose of administrative law with the idea of control: "It is not our purpose to list all the many powers of the administration, but to discuss and explain the extent to which and the means by which those powers are subject to some measure of control." Even to those who have moved away from this stereotyped outlook by observing that the administration also appears as an institution concerned with providing services and benefits, the theme of control remains very important. See, for example, the introductory remarks of Foulkes, 1982: 3.

There are not many who view this as a realistic description of the reality. For too long, lawyers have refused to recognize that the rule of law was a general standard to be achieved by the State. Like the *Rechtsstaat* of the German jurists, the rule of law is above all the expression of an ideal of public law, despite the many achievements which have already been made in this direction. Historically, the rule of law is seen as an instrument for doing away with the legal sequelae of the medieval State, which was distinguished by the absolute pre-eminence of the executive branch. The contribution of Dicey was to understand and rationalize the evolution that took place over two hundred years (1688-1889) and to formulate a legal rule better suited to the liberal society of his time. The Diceyan thesis may thus be seen as a historical review leading to the making of a new departure based on the supremacy of Parliament. Has this aim been achieved?

While Dicey's ideas, as we know, soon became accepted dogma in law schools, British law has not in fact moved completely through this transformation, although many already regard it as an established fact. By its association with the Crown, the Administration has acquired a special position which is in conflict with this too reassuring view. In terms of sovereignty within the State, the Crown is, whatever anyone may say, *primus inter pares*. As a result of the function of the Queen as Head of State, it is hierarchically superior to Parliament and the courts. The main result of this special position is to give it an extraordinary status. It is too easy to forget that, as in its heyday in the thirteenth century, the Crown is still "above the law." Strictly speaking, unless there is an express statutory provision to this effect, or the theory of necessary implication can be applied, the Crown is not bound by statutes despite having given its assent to them.[11] On a practical level, the Government exercises political control over Parliament. The Crown can then confer on itself any privileges it wants, or preserve the privileged position it enjoys at common law. Its many privileges and immunities often have the effect of placing it outside the ordinary rules of private law. In the courts, it can in many areas claim the benefit of a separate system of law (Chitty, 1820; Robertson, 1908; Williams, 1948; Currie, 1953).

The Administration, which benefits from the legal status of the Crown, is given a special pre-eminence under English public law (the first consequence) which *de facto* places it above other bodies of the State, thus creating exceptions to the application and meaning of the rule of law (the second consequence). In other words, the British model of Administration is regulated in many cases by special regimes which apply only to it,[12] and which are often extraordinary by comparison with the French or German solutions, in which much greater progress has been made in subjecting the Administration to the law and judicial control. In Canada, this disparity between reality and the general principles of public law is all the more crucial as this country moves toward a written legal system. There would thus appear to be a contradiction with the new *Canadian Charter*

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11. "In particular the Crown is not bound by an Act of Parliament unless the Act so provided expressly or by necessary implication" (Foulkes, 1982: 12).

12. British academic analysts nonetheless affect to believe the contrary, observing that public law is an integral part of the general corpus of the common law (Garner, 1979: 25). The common law nevertheless devotes a whole group of special rules to the Crown.

of Rights and Freedoms, which expressly recognizes the rule of law in its Preamble.[13] The differences with the British situation, however, go even further. Not only does Canada have a federal structure, but in addition the growth of its Administration has been marked by the creation of independent administrative agencies. These two new factors have had the effect of considerably increasing the complexity of the legal status of the federal Administration.

B. Complexity of Canadian Institutions

Beginning early in this century, a progressive fragmentation of the federal Administration has resulted in a formidable extension of the special privileges which might have been expected to be reserved for the Government alone. It has been as if the Crown had made an oil spill that continued to spread through intermediaries. First of all, the central Administration is associated with the Crown,[14] each department having at its head a "Minister of the Crown," who often represents the administrative unit he heads in adversarial proceedings, unless it is simply represented by the Crown itself through the Attorney General of Canada. In the case of independent administrative agencies, a quick survey shows the importance of the Crown's legal position (L.R.C.C., 1980: 152): not only are many of them expressly given the status of Crown agent by statute — for example: Northern Canada Power Commission (s. 4(1)); Science Council of Canada (s. 15(1)); National Capital Commission (s. 4(1)); National Research Council of Canada (s. 9(1)); Medical Research Council (s. 13(1)); National Harbours Board (s. 3(2)); Unemployment Insurance Commission (s. 6(1)); St. Lawrence Seaway Authority (s. 3(2)); Royal Canadian Mint (s. 5(1)); Canadian Livestock Feed Board (s. 9(1) of the *Livestock Feed Assistance Act*); Canada Employment and Immigration Commission (s. 10(1)); Social Sciences and Humanities Research Council (s. 16(1)); Natural Sciences and Engineering Research Council (s. 37(1)); Agricultural Stabilization Board (s. 4(1)); Atomic Energy Control Board (s. 3); Canadian Broadcasting Corporation (s. 40(1) of the *Broadcasting Act*) — but in addition there is an impressive number of special provisions partly extending Crown privileges to the remainder (Dyke and Mockle, 1983). For all practical purposes, the legal status of the Crown applies in varying degrees to most federal bodies, including Crown corporations. Observing the qualitative and quantitative significance of this status within the federal Administration demonstrates the urgency of a critical review. This seems all the more necessary as the operation of federalism has only served to increase the scope of its special immunities. Logically, it is this purely State aspect of the matter which must first be considered.

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13. "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

14. "What we do have is the Crown, which represents the sum total of powers of the central government, or we may say that central government is carried on in the name of the Crown" (Foulkes, 1982: 11).

1. The Impact of Federalism

This brief review of the British tradition has partly indicated the place the Crown holds in the "internal" workings of the federal Administration. Confusingly, it is the very status of this Administration which is assimilated to the Crown. This is the result of history, since originally Canada was a colony, the territory and inhabitants of which were governed directly by the Crown. In the absence of any action by the British Parliament, this colony was entirely subject to the exercise of the royal Prerogative, and royal proclamations could even have statutory effect (see *The Royal Proclamation, October 7, 1763*). The British Crown exercised this power through a colonial governor, the Governor General of Canada. This official thus enjoyed extraordinary and almost unlimited powers over the internal administration of the colony. However, the adoption of several British statutes (*The Quebec Act, 1774*; *The Constitutional Act, 1791*; *The Union Act, 1840*) had the effect of altering the legal status of Canada, which gradually acquired a parliamentary system of the British type. This evolution occurred in the century between the *Treaty of Paris, 1763* and *The Constitution Act, 1867*, the latter profoundly modifying the status of the Governor General by providing for the transfer of many privileges and immunities of the Crown to the Government (the Governor General in Council) (*The Constitution Act, 1867*, s. 12). The creation of the parliamentary system took place by transposing the British rules governing relations between Parliament and the Executive (in particular the fundamental statutes of the seventeenth century). In theory, the constitutional position of the Crown is thus essentially the same in Canada as in the United Kingdom.

In Canada, however, the reality is more complex. Unlike the situation in a unitary State such as the United Kingdom, federalism has resulted in a fragmentation of the Crown. Her Majesty also exercises supreme authority in respect of each of the Canadian provinces, with the result that there are eleven separate Crowns each having its own artificial legal personality.

Canadian federalism has thus given rise to a situation which does not lend itself readily to analysis. How is one to express the fact that there are eleven Crowns in one, yet Her Majesty remains a single person[15] although eleven persons coexist in her, with separate legal personalities? It is a truly theological mystery, which ultimately can only be explained by a comparison with the notion of consubstantiation. Although in essence the Crown continues to be sole and indivisible,[16] the Crown in right of Canada and the Crown in right of the ten provinces are still completely separate entities. Their privileges and immunities can be raised against each other, although the Crown in right of Canada has a pre-eminent position which has been decisive in the development of Canadian federalism.

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15. Her Majesty is an artificial person in addition to being a physical person. More precisely, she is a "corporation sole." See Maitland, 1901 and Kantorowicz, 1957.

16. Cuppaidge, 1953-54: 596; O'Connell, 1957: 105. As Mundell points out, "Her Majesty is the same person at the head of each of her two types of governments in Canada" (1960: 70).

For the federal Administration, this rather complicated situation carries with it two new benefits. As the Constitution gives the provinces exclusive jurisdiction over private law and judicial procedure, the Crown in right of the provinces is governed by specifically provincial provisions. The Crown in right of Canada, on the other hand, can benefit from new privileges and immunities which are not necessarily contained in the federal statutes. It can take advantage of provincial enactments in issues arising in a province, unless there is an express provision to the contrary in a federal statute. As the federal authorities have no jurisdiction to regulate the conduct and procedure of curial proceedings in provincial courts, the legal status of the federal Administration is considerably strengthened by these provincial enactments.[17] As the latter often vary from province to province, the status of the federal Administration becomes even more ambivalent and ultimately loses what little unity it still possessed. To internal incoherence is added external fragmentation.

The other more serious difficulty results from the privilege of non-applicability of statutes to the Crown. At the federal level, the wording of section 16 of the *Interpretation Act* confers this privilege absolutely: "No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to." This wording indicates that the Crown in right of Canada is superior to any law which does not mention it expressly or by necessary implication.[18] This has produced a whole body of decisions and academic analysis concluding that provincial legislatures cannot bind the federal authorities by use of the word "Crown."[19] This rule was clearly laid down by the Supreme Court in *Gauthier* in 1917. Certainly, such an immunity has unfortunate consequences. In various areas, the federal Administration may infringe provincial statutes while enjoying a complete immunity. This was true in the case of Eldorado Nuclear, a Crown corporation within the meaning of subsection 3(1) of the *Government Companies Operation Act*. An attempt by the Government of Ontario to make it subject to environmental protection provisions proved to be futile, since the Crown in right of Canada is not bound by provincial legislation (*R.* v. *Eldorado Nuclear Ltd.* (1982), 128 D.L.R. (3d) 82).

Federal public enterprises (*R.* v. *Eldorado Nuclear Ltd. and Uranium Canada Ltd.*, [1983] 2 S.C.R. 551) can also be expected to assert their administrative independence and plead their immunity in the event of any issue based on the application of a federal

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17. British Columbia: *Crown Proceeding Act*; Alberta: *Proceedings Against the Crown Act*; Saskatchewan: *The Proceedings against the Crown Act*; Manitoba: *The Proceedings Against the Crown Act*; Ontario: *Proceedings Against the Crown Act*; Québec: sections 94 to 100 of the *Code of Civil Procedure*; New Brunswick: *Proceedings against the Crown Act*; Nova Scotia: *Proceedings against the Crown Act*; Prince Edward Island: *Crown Proceedings Act*; Newfoundland: *The Proceedings against the Crown Act*.

18. On the principal cases in which this immunity is expressly recognized, see: *Bonanza Creek Gold Mining Company* v. *The King*, [1916] 1 C.A. 566; *Province of Bombay* v. *Municipal Corporation of the City of Bombay*, [1947] C.A. 58; *Her Majesty The Queen in Right of the Province of Alberta* v. *The Canadian Transport Commission*, [1978] 1 S.C.R. 61. On the historical origins of this immunity, see, in particular, Street, 1948: 362.

19. This is a problem peculiar to federal systems which have retained the tradition of British public law. For a comparison between Australia and Canada, see, in particular, McNairn, 1977: 15. See *Gauthier* v. *The King* (1917), 56 S.C.R. 176.

statute. This is, in fact, what occurred with Eldorado Nuclear and Uranium Canada, which were recently prosecuted by the Attorney General of Canada for infringing the provisions of the *Combines Investigation Act*. They set up their status as Crown agents, arguing chiefly that like Her Majesty they could not be the subject of a criminal prosecution, and that in any case, under section 16 of the *Interpretation Act*, the *Combines Investigation Act* does not apply to the Crown and its agents. The Supreme Court accepted these arguments, noting that the administrative independence of these enterprises did not prevent them from claiming the status of a Crown agent, since in the particular case in question they were acting within the scope of the purposes mentioned in the statute and so retained the immunity they enjoyed in principle. This case has thus created a new paradox, since association with the legal status of the Crown has essentially given these public enterprises a distinct position capable of frustrating the will of the central Government. Curiously, the rule of non-applicability of statutes to the Crown worked against it, since in this case it failed in its attempt to make its own agents subject to the general rule of law established by parliamentary legislation.

This type of conflict, pitting the Crown against itself in criminal proceedings, may seem surprising, at least at first sight. If the component parts of the federal Administration which are associated with the legal status of the Crown become merged in its legal personality, it might seem unlikely that disputes would arise between these various embodiments of the same Sovereign. However, in a modern governmental context this apparent unity remains a fiction. First, it should be observed that such internal cohesion would require a degree of centralization which is not possible with the existing structure of the federal Administration. More significantly, the rule of non-applicability of statutes to the Crown, when incorporated into a decentralized structure, whether federal or otherwise, can only serve to demolish the rule of indivisibility, as was clearly demonstrated in the second *Eldorado* case. The problem is a similar one with respect to the Crown in right of Canada and of the provinces. As it is above the law, each Crown, federal or provincial, or each agent of the Crown in right of Canada, in law falls outside the scope of a legislative rule which is supposed to apply to all; this amounts to making each one subject to a different system of law. Since each can claim to avoid the ordinary laws of Parliament by pleading its immunity, the possibilities of conflict or opposition within the Crown itself are quite real.

Aside from the disputes which have traditionally characterized federal-provincial relations, therefore, this immunity has considerable significance in administrative law terms. The federal Administration is indeed "above the law," especially in relation to provincial regulation, which even further extends the scope of its extraordinary position. In this sense, certain commentators have been right to argue [TRANSLATION] "that in Canada we live under a system of partial rule of law, since the federal Government is not bound by provincial law" (Brun and Tremblay, 1982: 491). What is worse, this immunity is directly contrary to the principle of equality under the law, as now established by section 15 of the *Canadian Charter of Rights and Freedoms*. It is therefore obviously necessary to move towards a solution which is more in accordance with the rule of law and the principle of equality, as these are now to be a fundamental part of Canadian public law. Undoubtedly, the problem of the application of provincial enactments to the

federal authorities raises difficult questions of adjustment and is really a political one in many respects. However, this is not sufficient reason to abandon the search for more appropriate solutions. If the federal Government is not subject to laws, whether provincial or federal, it is no exaggeration to say that such a situation is incompatible with the spirit of a liberal regime and the very idea of law. Even in the Continental tradition of administrative law, the Administration is far from having such extraordinary privileges, which suggests that the unacceptable nature of the existing situation should be further examined.

2. Fragmentation of the Federal Administration

The system of Crown agents has tremendously enhanced the Crown's legal position. Especially since the end of the last War, the legislator has regularly conferred the Crown's status on independent administrative agencies with widely varying purposes. The situation is further confused by the variety of terminology used to refer to entities, some of which are similar and others of which are not. We need only mention such phrases as "Crown agents," "Crown corporations," "public enterprises," "public corporations," "Crown agencies." All these bodies do not perform similar functions. Although they have a legal status which is often the same by being associated with the Crown, they are still too numerous, and this justifies a division to facilitate an understanding of the subject.

On a quite general level, the most widespread distinction is that based on the nature of the activities in question. Although we do not necessarily approve it, the distinction suggested by the Lambert Report (Royal Commission ..., 1979) between "independent decision-making and consultation bodies" and "Crown corporations" seems the most satisfactory.[20] The first grouping includes what are really "administrative agencies" in the fullest sense, since these are independent bodies exercising purely administrative functions (which does not preclude properly administrative decisions being made in accordance with rules and safeguards of a judicial nature), which connect them closely with the central Administration (such as the Canada Labour Relations Board or the Canadian Transport Commission). In the second, the industrial and commercial nature clearly predominates (such as Loto Canada or Via Rail). This distinction is very significant, because the association with the Crown's legal position does not have the same implications in both cases.

(a) Independent Administrative Agencies

In the traditional sense independent administrative agencies, as their name indicates, are independent bodies which have a separate status and exist to "perform functions of a purely administrative nature." They are for the most part what Garant has referred to as [TRANSLATION] "quasi-departmental bodies and government agencies" (1985: 93), but

20. This division continues to be significant although the Commission has placed under these two headings agencies which do not appear to fall within them or which should be in some other category. See, in particular, the comments of Gélinas, 1979: 545.

do not include public enterprises. In its Working Paper 25 (L.R.C.C., 1980), the Commission took a restrictive approach and was concerned primarily with bodies exercising quasi-judicial and regulatory authority. Despite all the ambivalence still surrounding the concept, in the final analysis it is custom and attitudes which give independent administrative agencies this restrictive meaning, since in fact the designation immediately calls to mind the Unemployment Insurance Commission, the National Energy Board, the Canadian Radio-television and Telecommunications Commission, the Atomic Energy Control Board and many others (L.R.C.C., 1985: Appendix A). In essence, these bodies perform duties which are judicial or administrative (the granting function, regulation, policing and supervision), the purpose of the latter being the issuing of a benefit or a prescription.[21] Although the picture sometimes includes certain activities of an industrial or commercial nature, the category is still valid. These activities are usually a part of the Government, which seeks to confer a special scope and significance on them by making separate administrative authorities responsible for them. Even though the latter "seem to spring up everywhere" (L.R.C.C., 1980: 8), they are fundamentally similar for administrative purposes. Such bodies are generally associated with the legal status of the Crown and are often designated Crown agents. In matters of position and status they are an extension of the Crown, which enables them to enjoy a special pre-eminence and exercise a control or regulatory function which, in theory, should be exercised only by the Executive. Their purposes and status are therefore closely associated and give them a special nature reflected primarily in their administrative and budgetary independence.

This independence should not, however, obscure the important part these organizations play in the work of the executive branch. In some cases, they are even extensions of the central Government, which then exercises a controlling authority which has been called into use many times (Garant *et al.*, 1977: 466). The political importance of the powers conferred on them and their association with the Crown's legal position both show that they are in many respects part of the process of Government. Accordingly, any review of the privileges and immunities held by these organizations cannot be separated from a general analysis of the executive branch, and in particular of the federal Administration as a whole. A closer examination of their legal position also demonstrates the urgent necessity of seriously considering unification of the legal status of the federal Administration. By unification we mean the application of a uniform legal system of rights, privileges and immunities throughout the Administration for the purpose of consistency and clarification. Inconsistencies abound in the field of independent administrative agencies. For the same function, an agency may be a Crown agent or it may have no special status.[22] For example, an independent agency may in general not be regarded as

21. These are the functions which have been primarily considered by academic analysis, as can be seen from the text by Brown-John, 1981: 86 ff.

22. For example, section 10 of the *Farm Credit Act* provides that the Farm Credit Corporation is an agent of Her Majesty "for all purposes of this Act," except subection 18(2), which divests it of this status for the holding of certain sums of money. In other cases, the status of Crown agent is not even clearly stated, as in section 4 of the *National Housing Act*, which states that every right or obligation acquired or incurred by the National Housing Corporation under the Act is a right or obligation of Her Majesty. The possible link to the Crown would appear to limit the action of this Corporation, as the question of its status has not been settled. In a similar way, subsection 44(2) of the *Canadian National Railways Act* allows CN to exercise any procedural privileges of Her Majesty, even though this company is not an agent of the Crown.

an agent of Her Majesty, although its property "is deemed to belong to Her Majesty," and it also contracts on her behalf.[23] These disparities make the status of some organizations, or more generally, of many Administrations, especially complex, as can be seen from section 7 of the *Defence Production Act*:

> **7.** (1) Notwithstanding that a corporation is an agent of Her Majesty, the Minister may, on behalf of Her Majesty, enter into a contract under this Act with the corporation as if it were not an agent of Her Majesty.
>
> (2) The Minister may, with the approval of the Governor in Council, enter into a contract with a person authorizing that person to act, under the control and direction of the Minister, as an agent of Her Majesty, for any of the purposes for which the Minister is authorized to act on behalf of Her Majesty under this Act.

Whether dealing with independent agencies or with the rest of the Administration, we no longer really know where the Crown's legal status begins and ends. The situation becomes even more complex when special immunities become involved in this regime. There are many examples of this in the field of independent administrative agencies alone. Thus, the Northern Canada Power Commission, made an agent of Her Majesty by subsection 4(1) of its enabling Act, nonetheless benefits under section 26 and subsection 28(2) from a privilege excluding liability "by reason of its failure to supply any public utility." Similarly, the National Research Council of Canada, which also has the status of a Crown agent, can claim the following immunity under subsection 7(3) of its enabling Act:

> No action or other proceedings may be instituted against the National Research Council or any officer or employee of the Council in respect of any advice, information or report given or made in good faith under this Act or any other Act of the Parliament of Canada.[24]

As a further example, subsection 30(3) of the *Northern Pipeline Act* enacts a privilege excluding liability by the Minister and anyone acting on his orders in implementing any provision of the Act:

> The Minister or any person he directs, pursuant to subsection (1), to perform a term or condition or carry out an order or direction is not personally liable civilly or criminally in respect of any act or omission in the course of performing the relevant term or condition or carrying out the order or direction under that subsection unless it is shown that he did not act reasonably.

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23. For examples of this type, see subsection 3(2) of the *St. Lawrence Seaway Authority Act*, which provides:
    > Except as provided in section 9, the Authority is for all purposes an agent of Her Majesty in right of Canada and its powers under this Act may be exercised only as an agent of Her Majesty.

    Similarly, subsection 25(2) of the *Fort-Falls Bridge Authority Act* states that:
    > Notwithstanding subsection (1), the Authority is, for the sole purpose of entering into the agreement referred to in subsection 4(2), an agent of Her Majesty.

24. Subsection 7(3) of the *National Trade Mark and True Labelling Act*. See also the *Energy Supplies Emergency Act, 1979*, which authorizes the Energy Supplies Allocation Board to benefit from a similar immunity under subsection 9(7):
    > The Board and its members are exempt from liability for any act or thing done or omitted by the Board in good faith in the exercise or purported exercise of a duty or power under this Act.

Although these sections make no reference to the Crown, the Administration thus benefits from various immunities which indeed seem extraordinary, even compared with the provisions applicable to the Crown under "the 1953 Act." The Administration or one of its employees may also benefit from a special status simply by means of a general reference. For example, section 22 of the *Canadian Wheat Board Act* authorizes the Board and its members, for the purposes of inquiries, to exercise all the powers provided for in Part I of the *Inquiries Act*.[25] A review of these provisions indicates that they may actually have available to them all the powers of a court of record in a civil proceeding, privileges that are considerable even though not part of the Crown's legal status. These examples show, therefore, that in many cases the Administration, without being associated with the Crown, can be in a better position than the latter in dealing with the claims of individuals. The question therefore arises as to the advisability of a substantive distinction between "the Administration as the Crown" and the Administration in another capacity, since this type of Administration benefits in various ways from a complex body of privileges and immunities.

This re-examination is all the more necessary in the field of independent agencies as, in some cases, the omissions of the legislator have not even made it possible to identify clearly and precisely the legal status of the organization in question. The courts have accordingly been obliged to fill in the sometimes deliberate omissions, and in so doing, develop a complex range of criteria for identification (Garant and Leclerc, 1979). For a service or an organization to have the status of a Crown agent, the court looks, among other things, at the nature of its activities, the controls to which it is subject, the status of its personnel and property, budgetary independence, methods of management and financing, the extent of certain supervisory and regulatory powers, *a posteriori* financial audits and so on. These criteria have been criticized by academic writers, who argue that they are not consistently applied and so lead to contradictory solutions (Lemieux, 1983). In any case, none of these criteria is sufficiently precise to allow a definite *a priori* classification of the organization in question. These uncertainties suggest that changes are desirable to ensure a minimum of stability and security in relations between the Administration and individuals.

The picture is even less clear when the status of a Crown agent is properly understood. This classification does not mean that the agent will benefit from all the Crown's immunities (Lemieux, 1983). Only the Crown is in a position to claim to be immortal ("The King never dies"),[26] as well as the special immunities associated with the exercise of the royal Prerogative. Additionally, "other immunities are rarely extended to a Crown

25. See also subsection 26(2) of the *Fishing and Recreational Harbours Act*, and subsection 110(2) of the *Unemployment Insurance Act* which both refer to the *Inquiries Act*.

26. Concerning this fictitious concept of perpetual existence and its origins (*imperium semper est*), see especially Kantorowicz, 1957: 273.

agent'': non-prescription of rights, the rule of confidentiality and the rule that a budgetary authorization is necessary for an organization to be bound.[27] Even within the legal status of the Crown, therefore, there are differences which make it singularly complex.

Taking the concept of independent administrative agencies alone, the legal status of the federal Administration already begins to look like a Byzantine mosaic. When we look at public enterprises and their subsidiaries, this fragmentation takes on striking proportions.

(b) Public Enterprises

In contrast with the preceding category, the phrase ''public enterprise'' is much more meaningful in itself. In the economic sense, an enterprise is an organization for the production of goods or services for commercial purposes. It may take on a public aspect if the Government owns it or is the majority shareholder, even though it still has the corporate structure of private law. Often this status is only a matter of appearances, because if it is controlled or owned by the Crown the latter can then raise its privileges and immunities against third parties. Although in many cases the method of creation and operation of such enterprises falls within private law, the enterprise is nonetheless clothed with a public status because of the special nature of its owner.

Although the number of public enterprises has increased dramatically since the last War, interest in them is relatively recent.[28] It was not until March, 1976, that the Auditor General of Canada drew Parliament's attention to the financial management and control of Crown corporations. In 1977, the Treasury Board Secretariat tabled with the Public Accounts Committee an allegedly exhaustive list of these public corporations.[29] In that same year, the Privy Council Office published an important report on Crown corporations (Privy Council Office, 1977), which contained as its principal recommendation a Bill on ''the control, direction and accountability of Crown corporations.'' On the same lines, the Government, in November, 1976, created by Order in Council a Royal Commission on Financial Management and Accountability, which tabled its final report, the ''Lambert Report'' in 1979.[30] Without suggesting a Bill as such, the report contained many recommendations focusing on control and accountability. Finally, several studies have attempted to fill the gap by imposing a further degree of rationalization on this complex area.[31]

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27. Lemieux, 1983. This is confirmed by Robinson, 1925: 16, who suggests that an agent of the Crown must be directly associated with the latter in order to claim all its immunities ''... so that it may be regarded as having emanated from the Crown in a similar manner to the great Departments of State.''

28. As Garant observes, [TRANSLATION] ''the law of public enterprises in Canada and Québec is a branch of economic public law which is still being defined. An awareness of the extent and complexity of the legal problems presented by this somewhat diffuse network of public or mixed institutions is very recent'' (1984a: 296).

29. This list is updated. One of the most recent is dated December, 1983 (Treasury Board of Canada, 1984).

30. For various reactions to this report, see (1979), 22 No. 4 of *A.P.C.*, 511-580.

31. See, in particular, two digests: Institut de recherches politiques, 1981; British Institute, 1970. See also: Ashley and Smails, 1965; Gélinas, 1978. For articles, see: Barbe, 1966-68; Langford, 1980.

With the adoption in June, 1984, of the *Act to amend the Financial Administration Act in relation to Crown corporations* (Bill C-24), Parliament finally gave expression to the concerns raised regarding the management and control of public enterprises, although not without some hesitation as can be seen from the ill-fated Bills C-27 in 1979, C-123 in 1982 and C-153 in 1983. By substituting the concepts of "Crown corporation" and "departmental corporation" for the threefold distinction so vigorously opposed in the Lambert Report (Royal Commission ..., 1979: 321) (the *Financial Administration Act* had previously distinguished among "departmental corporations," "agency corporations" and "proprietary corporations"[32]), the legislator has undoubtedly made some progress. The concept of *société d'État* will be used from now on to designate what is referred to in English as a "Crown corporation." By reference to this concept of a Crown corporation, it is made clear that *sociétés d'État* are corporate entities engaged on the Government's behalf in activities of an industrial and commercial nature, which corresponds closely to *entreprises publiques* ["public enterprises"]. As early as 1977 the Privy Council report stated that "when the term Crown corporation is used, the corporations which most often spring to mind are those which provide goods or services directly to the public on a commercial or a quasi-commercial basis" (Privy Council, 1977: 14). Although the purposes of these corporations sometimes go beyond commercial activity, they are nonetheless distinguished chiefly by their "business" aspect (Hodgetts, 1970).

Associated with the concept of a "Crown corporation" is that of a "departmental corporation," which still is subject to some confusion, since it is defined chiefly by reference to Schedule B of the *Financial Administration Act*. It appears that by "departmental corporation" the legislator means a category distinguished primarily by the way in which it is created (its corporate form). However, "Crown corporations" also have a corporate structure. All ambiguity could have been removed by the adoption of a material definition which would take in, under one category, organizations having a similar nature and function. This type of definition already exists in embryo in recent amendments, since the new subsection 2.1(1) of the *Act to amend the Financial Administration Act in relation to Crown corporations* provides that "[t]he Governor in Council may, by order, ... add to Schedule B the name of any corporation established by an Act of Parliament that performs administrative, research, supervisory, advisory or regulatory functions of a governmental nature." This provision is worth noting, since it refers clearly to functions of a purely administrative kind, suggesting what is meant by "independent administrative agencies." We may therefore conclude that by *société d'État*, Parliament is referring to Crown corporations engaged in industrial and commercial activities (public enterprises), and by "departmental corporations" it means Crown corporations exercising purely administrative functions. If the latter category includes independent administrative agencies, it only partly covers this concept, since such entities are not all corporate in structure. Essentially, the legislator is making a distinction between commercial and industrial entities on the one hand and administrative ones on the other.

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32. Subsection 66(1) of the *Financial Administration Act* states that:
"Crown corporation" means a corporation that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, and includes the corporations named in Schedule B, Schedule C and Schedule D; ...
This list is included as an appendix to the Privy Council report.

For the purposes of this Working Paper, these problems of clarification are indicative of the nature of the ideas prevailing at this time. By omitting to impose a more systematic arrangement on the various classes of public organizations, Parliament has indicated that it is concerned essentially with problems of control and management.[33] The question of the legal status of these organizations is completely overlooked, since a re-examination of that status cannot really be undertaken without some attempt at classification. More importantly, none of the reports or documents cited above discusses the consequences attaching to this exceptional status which results from the legal position of the Crown; yet this is the most important problem of substance in the entire subject, and studies dealing with it are still few in number (Griffith, 1951-52; Kirsch, 1984). The problem is even more complicated as subsidiaries have the effect of extending the ramifications of the Crown's legal position still further.

By placing its emphasis on parliamentary and ministerial supervision of these agencies, the Government has taken their association with the legal status of the Crown for granted. With the recent amendments made to the *Financial Administration Act*, this subsidiary relationship becomes even more apparent, since the Act now defines the Crown (in section 85) as "Her Majesty in right of Canada or any agent of Her Majesty in right of Canada and includes a Crown corporation and a departmental corporation" (*Act to amend the Financial Administration Act in relation to Crown corporations*, s. 10). Even though it applies only to Part X of the Act, a definition of this kind reinforces the arguments we have made in this Working Paper by indicating clearly that a large part of the federal Administration is concealed behind the concept of the Crown. In the specific case of public enterprises, the special status that results thus appears even less open to question, since there is a regular and systematic interconnection between such corporations and the public interest. The Privy Council report stated that "the utility and value of Crown corporations in the pursuit of public policy objectives is not at issue" (Privy Council, 1977: 13). It also spoke of effective and viable management in the public interest, which in itself is a desirable objective, but which does show also how far one can go in attempting to justify the existence and status of these very varied organizations by notions of the general or public interest. The now discontinued Bill C-27 provided that all Crown corporations were equal in their status as instruments "for the furtherance of the national interests of Canada" (section 8); yet many of them are engaged in activities which are unquestionably industrial and commercial in nature and do not necessarily warrant having the special privileges of the Crown.[34]

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33. This is the point on which academic analysts are most at variance, as can be seen in the studies of McLeod, 1980: 142 and Thomas, 1979.

34. For example, the Crown Assets Disposal Corporation, made an agent of Her Majesty by subsection 6(3) of its enabling Act (*Surplus Crown Assets Act*), also benefits in subsection 7(10) from a privilege excluding liability through a reference to its staff:

> No director and no person acting for, on behalf of, or under the authority of the Board or a director is liable to any person for any act or omission that the director or person acting in good faith reasonably believed to have been required or authorized by or pursuant to this Act.

It should be noted that certain writers have begun to question the privileges and immunities conferred on public enterprises. Thus, Lemieux wonders about the advisability [TRANSLATION] "of preserving the status of public enterprises as Crown agents, especially as the standards formulated by the courts seem to be very inadequate." He goes on to say that [TRANSLATION] "it may be time to examine the merits not only of the actual legal status of public enterprises but the value of the Crown immunities affecting them as well" (1984: 432).

This has two consequences for the direction of our future research. First, it appears unlikely that the question of the status of public enterprises and other independent bodies can be resolved separately. It will only be by a thorough examination of the legal status of the Administration as a whole that the legal position of public enterprises can be given, from a critical reappraisal. Second, it suggests that the references ostensibly made to the general interest mean that a re-examination of the privileges and immunities enjoyed by the federal Administration will always be obstructed by factors that are more difficult to rationalize. Some consideration should now be given to this subjectivity surrounding the Crown and the Administration as a whole. The limits of this analysis and its purposes may not be understood unless certain irrational factors and conceptual difficulties are clarified at the outset.

II. Continuing Misconceptions

In our initial review of the considerations which fundamentally affect the legal status of the federal Administration, we merely noted the scope and significance of the Crown. On the other hand, there is nothing that defines the exact nature of this entity for the purposes of this analysis. In administrative law, the true nature of this concept and its function do not appear to have been satisfactorily explained. Accordingly, there are still too many areas of uncertainty and some preliminary analysis appears necessary.

In the modern administrative law context, the function and significance of an institution such as the Crown raise many questions. How much importance has it when it appears to be in a process of decline? Some movement in the direction of making it subject to the ordinary law would seem to indicate that the extraordinary nature of the law applicable to the Crown is continually being reduced in favour of a legal status of the same kind as that enjoyed by individuals. There would seem to be many indications that this institution is not well suited to the circumstances of our time. This creates the paradox of an appearance of decline and the considerable expansion of the administrative function.

However, these appearances are misleading since the Crown still represents a collection of powers and privileges which are of surprising relevance, whatever their historical vicissitudes. In actuality, the many doubts that still exist as to the rights and powers of this institution only reflect our uneasiness, and undoubtedly our fear as well, about formulating a modern and consistent legal status for the Administration. Is not the principal problem that of defining the nature of these privileges and identifying their principal beneficiaries? Is an attempt to throw light on the subject not a means of ensuring an enlightened choice among alternatives? The importance of understanding the issues which have been more or less obscured by the existing confusion is thus readily apparent.

In large part, these difficulties originate in the ambiguous relationship existing between the Crown and the Administration. To the extent that, as we have seen, the Crown is a vast and complex entity covering a part of the Administration, any analysis of the status

of the latter thus depends in part on the considerations affecting that of the former. This does not mean that the Administration cannot have characteristics that apply to it alone. It simply means that, in determining the direction of this research, one must recognize the decisive importance of the Crown, bearing in mind that this institution has developed in a separate and independent way which is capable of distorting any conclusion regarding the Administration. Conversely, the association which has been a matter of history up to the present time is largely artificial, inasmuch as these two entities, the Crown and the Administration, are quite different in nature. Reference to the Crown alone may thus lead the discussion astray.

A. Terminological Confusion

Any study pertaining to the Crown first encounters a problem of terminology. This is a very real obstacle, since it is often difficult to determine the contemporary meaning of the word "Crown." Is it a separate legal entity which cannot be reconciled with other concepts, or on the contrary, should it be regarded as a somewhat outmoded expression of a power recognized as existing within the State? There is clearly some uncertainty as to the exact meaning of this concept, and it can be seen in official documents and in academic commentary. There does not appear to be any unanimity as to the real meaning of the word.

1. Uncertainty As to the True Identity of the Crown

The various Canadian legislatures have not defined the word "Crown" in the same way, regarding it as an everyday word which does not in itself have a full legal meaning.[35] One British writer notes that "[i]t is not ... a technical term of precise signification" (Jennings, 1976: 220). It is in fact a general expression to designate what is, by common consent, properly referred to as "Her Majesty in her executive capacity." This direct reference to the Head of State has been observed in many statutes, those of the federal Parliament, British Columbia (*Crown Proceeding Act*, s. 7) and Alberta (*Proceedings Against the Crown Act*, s. 12) in particular. In Saskatchewan (*The Proceedings against the Crown Act*, s. 14) and Manitoba (*The Proceedings Against the Crown Act*, s. 13), on the other hand, the Crown may be designated as the Government of the province in question. In New Brunswick, it represents simply "the Province of New Brunswick," which thus gives it a very wide application (*Proceedings Against the Crown Act*, s. 11).

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35. Hogg, 1977: 164. See also Mundell, 1961: 149. In another article, Mundell appears to advocate even more categorically abandoning the expression "Crown" and all the esoteric terminology that flows from it: "As Maitland pointed out many years ago the use of the term Crown leads to confusion. As he says, the Crown does nothing but lie in the Tower of London to be gazed at by sightseers and has no legal existence. The use of the term tends to obscure the fact that the sovereign is a person for legal purposes" (1960: 57). On these problems of terminology, see also Marshall, 1971: 17.

A similar discrepancy exists in theoretical analysis. Writers such as Garant have indicated their desire for a complete break with this practice, referring to the Executive or the Government (1972; Lieberman, 1975). The British Columbia Law Reform Commission has not hesitated to say, in agreement with Lord Diplock (*Ranaweera* v. *Ramachandran*, [1970] A.C. 962: 973) and Laski,[36] that "the 'Crown' is really synonymous with the 'government' " (1972: 9). Garner, on the other hand, gives it a wider meaning when he says that "[t]he Crown ... means ... 'the administration,' rather than the person of the sovereign, and certainly not the Government for the time being in power" (1979: 300). For Jennings, "the tendency is to use the word 'Crown' in relation to acts which are done by some public authority, but ascribed to the Queen because the power so to act is legally vested in her" (1976: 221). Foulkes considers that "the Crown ... represents the sum total of powers of central government .... 'The Crown' gives in that sense a legal unity to those powers" (1982: 11). In a more general sense, Laskin considers that "the Crown in one or other of its Canadian aspects personifies the state" (1969: 117-119). In *Labrecque*, Beetz J. adopts, relying on Griffith and Street (1973: 246), the idea that the Crown personifies the State. Taking a similar view, Hogg observes that "the state or the government could as well be used instead of the Crown" (1977: 164). These examples of discrepancies could easily be multiplied and even extended, since in a more purely political sense and in keeping with tradition, the Crown also symbolizes the nation.[37] In a strictly institutional sense, nonetheless, the State, the Government and the Administration represent distinct entities which cannot be confused.

Does the Crown after all represent a specific function or organization within the State?[38] Its ever changing nature seems to defy any such suggestion, since the Crown is clearly the State, the Head of State (Mallory, 1968), the Executive, the Government, the Administration and the machinery of justice derived from the Crown. In a more abstract sense, it is the embodiment of State sovereignty in countries with a British tradition. It sometimes provokes mistrust, even hostility, as the term refers too obviously to royal privilege. It was in fact associated in the last century with arbitrary action by the Administration, and some liberal opinion therefore called for its rights and privileges to be limited in order to ensure the supremacy of Parliament, as a means of safeguarding the freedoms of individuals.

Without wishing to misinterpret this multiple nature, we must recognize that the Crown is primarily an institution symbolizing two aspects of the State, the Monarch and the Executive. The privileges and immunities pertaining directly to the person of the Monarch are outside the scope of this Working Paper. So far as the Executive is concerned, the fact that it takes in both the Government and the Administration does not mean that

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36. According to the well-known remark of this writer, "Crown in fact means government, and government means those innumerable officials who collect our taxes and grant us patents and inspect our drains" (Laski, 1919 *in fine*).

37. "The Queen personifies the State and the nation, their history and continuity" (de Smith, 1981: 119). On the meaning of the saying *Pro Rege et Patria*, see Kantorowicz, 1957: 259.

38. "To the ordinary citizen it does not matter whether or not the public authority with whom he deals is or is not regarded in law as 'the Crown.' To him it is simply 'the government' or the administrator" (Mitchell, 1964: 222).

the Crown can be associated exclusively with either of these terms. The institutional aspect gives way here to a more functional meaning, with the Crown as primarily an expression of the executive function. However, the organic aspect is still important since, in referring to the domain and property of the Crown, one is in any case speaking of an artificial person under public law. In the field of contract the same is true, since contracts are concluded on behalf of Her Majesty. The organic aspect is not sufficient to explain the basis of the privileges and immunities exercised by the Administration through its connection with the legal position of the Crown. For the purposes of administrative law, therefore, the Crown does not have an essentially organic or institutional meaning, suggesting the existence of a dualist nature.

2. Toward a Distinctive Meaning for Administrative Law

Even before it is an organ or a function, the Crown is the manifestation of a legal system rooted in the past. It represents the historical residue of the powers and privileges formerly held by the Monarch personally. Although technically correct, this statement does not entirely account for the contemporary significance of these powers and privileges. They are the result of a notion of special pre-eminence expressed only in part by a simple reference to the Monarchy. The concept of the Crown represents powers, special attributes, chiefly associated with the executive branch. It is this idea of a distinct difference which underlies the statements made by Blackstone, in particular where he says that the royal Prerogative "must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the King enjoys alone, in contradiction to others, ..." (1829: 239). Considering their specific activities in comparison with activities in the private sector, the State, and more precisely the Executive, appear to be provided with separate and distinct powers of a higher order, which is well expressed by the phrase "royal Prerogative." In a way, it is an *Imperium* of the "public authority" type (*puissance publique*) (Rousset, 1960), which can easily become undesirable if it is given an overly exclusive or authoritarian interpretation. Although the Crown is still imbued with this idea of the *Imperium*,[39] it is not enough in the present day simply to refer to the idea of an immanent power. In a simpler form, more in keeping with the aspirations of our time, the legal status of the Crown means ascribing to the Government and to a part of the Administration, for purported reasons of public utility, a power which was originally unlimited and outside the ordinary law. This power remains untrammelled and absolute until it has been limited, reformulated or simply abolished by Parliament.

This reference to the idea of powers and legal status in order to define the Crown clearly can only give a partial view of the situation. In terms of constitutional law, the Crown is a genuine institution, which first of all embodies the Head of State, and then is the expression of the acknowledged authority of the Executive. In terms of administrative law, on the other hand, the Crown has more the appearance of a power, or more

39. The concept of *Imperium*, derived from ancient Rome, was adopted by many medieval jurists to strengthen the authority of the Monarch. In the Roman sense, it represents the power of commanding the armed forces exercised by the Emperor. It expresses the idea of absolute authority based on the position of supreme military commander with a monopoly on the powers of constraint.

precisely, a legal regime. In order to justify certain capacities of the Executive which rest on no enabling legislation, the Crown is clearly a power the basis for which is constitutional custom. On the other hand, so far as privileges and immunities in relation to judicial review are concerned, it is clearly a legal regime which primarily benefits the Administration. For the purposes of administrative law, the Crown represents, first and foremost, an extraordinary public law regime, which exists for the purpose of recognizing exceptions benefiting many administrative functions. The question of whether the legal status of the Crown applies is a subjective one. Such recognition depends in large part on the intent of the legislative drafter. In this sense, the legal position of the Crown does not represent a series of rights and obligations of a wholly different nature from those which may be met with in private law. Not only is the special nature of such a legal entity not dependent on the field in which it applies, but in addition, it is the expression of rights and procedures which are not necessarily different from the ordinary law. For example, the tortious liability of the Crown in right of Canada is modelled largely on the rules of the ordinary law, which makes the special nature of this area of the law somewhat relative. This rather artificial aspect is all the more apparent as British public law has not evolved in the direction of creating specific rules governing equally specific situations. As the common law has had a preponderant effect, the definition of a separate public law status cannot be undertaken without reference to arbitrary factors (historical evolution, monarchical ideas) which do not lend themselves to a rational presentation of the subject. The special status allowed the Crown is especially difficult to comprehend, as the privileges and immunities pertaining to that entity are an integral part of the common law, which rejects any distinction between public and private law. The rules applicable to the Crown, taken in isolation, nonetheless constitute a special public law status. In fact, they represent the beginnings of a separate body of administrative law applicable to a large part of the Administration.

Recent trends in English law reinforce an analysis of this kind. The House of Lords has not hesitated to make a clear distinction between public and private law for the purposes of judicial review of the Administration. In particular, it has held that in order to challenge decisions of a quasi-judicial nature, the ordinary remedies of private law could not be used in place of the special remedies for judicial supervision of the Administration (*O'Reilly* v. *Mackman*, [1983] 2 C.A. 237). Commenting on the scope of this decision, a British writer recently noted that:

> [The] English Law had arrived at the point of establishing a distinct body of public law. The demolition of Diceyan doctrine has by now been complete, and there seems little reason to revive it in putting the system of contemporary public law on a more modern basis. (Blom-Cooper, 1983: 216)

This recognition of an independent body of public law makes the existence of two legal systems applicable to the Administration, one of private and the other of public law, more readily acceptable. By their link to the Crown, some administrative activities claim a special primacy over individuals, which only confirms the importance of public law in this area. In this sense, the special rules resulting from the exceptional status of the Crown confer a separate public law status on government bodies which benefit from them. Does this public law, or more accurately administrative law, at present rest on any

specific criterion or fundamental concept? It seems unlikely, as the exercise of "governmental" functions is hardly sufficient justification for this separate status, insofar as such activities are closely associated with other functions of the Administration, which in theory remain subject to private law. It is difficult to formulate a consistent classification: it is not so much the nature of the activity which justifies its being linked with the Crown as the desire to confer on it a special position in order to attain certain ends of general significance — at least in theory, for in practice, acquisition of the Crown's legal status has been prompted primarily by a desire to strengthen the Administration's position in areas where national interests seem paramount. This approach is in fact not a new one, since in the thirteenth century the English Administration took care to solidify its powers by basing its own authority on that of the King.[40]

"The Administration which is not the Crown" also does not constitute a homogeneous body of functions. It is often governed by special legislative provisions which, as we have seen, confer many special immunities on it. The justification for a dualist system for these two components of the federal Administration is thus uncertain in the present state of the law, as both depart from the general rules of the ordinary law in varying degrees. From a reform standpoint, the Commission feels it would be simpler and more logical to make them subject to the same legal system. The first to benefit from such a change would be the Administration, which would now be subject to a coherent system. The position of individuals would also be improved, if this reassessment tended to create a better balance between competing interests.

B. Obfuscating Contemporary Reality

Given the considerable progress, in the last twenty years, of systematic analysis of Canadian public law, it may seem surprising that there is no work of general analysis on the Crown. This concept is closely connected with the exercise of the executive function.[41] The deficiency is all the more surprising because the Executive is now of such major political and legal significance in contemporary States. Nonetheless, through its historical and political tradition, the nature of its economy and the increasing importance of the State, Canada is undergoing a process of development comparable to that of other Western

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40. "Before the date of Henry III's death, there was an administrative machine, not only working in the King's interests, but also, as becomes a true bureaucracy, anxious to increase the sphere of its own activities and the amount of its fees. For this purpose it was using the King's power" (Ehrlich, 1921: 20).

41. [TRANSLATION] "Legal literature on the very bases of our public law is relatively limited. There are not many writers who have dealt with the legal status of the governmental administration, the Crown in its executive capacity ..." (Garant, 1985: 26). There are not many comprehensive works on the Crown. The text by MacKinnon (1977) is general in nature and primarily emphasizes the function of Head of State. However, there are a number of studies on particular privileges, especially in the area of tortious liability. See: Immarigeon, 1965; Ouellette, 1965; Hogg, 1971; Levy, 1957. For a recent summary, see Law, 1982.

nations. This growing importance of the Executive, although slow to be reflected in legislation, has developed *de facto* nonetheless. In this sense, several writers have noted a general trend towards a disequilibrium of powers favouring the Government, even though Parliament remains theoretically sovereign, leading them to refer to the "primacy of the Executive."[42] If the legal position of the Crown is in fact one of the tangible results of this primacy, how can the relative absence of studies on the subject be explained?

1. The Absence of Doctrine

There seem to be two main reasons for the attitude of academic analysts. The first concerns the federal structure of Canada. As a general rule, the study of federalism and the division of powers seems to absorb all their attention, at the expense of a comparable analysis of the various parts of the machinery of Government.[43] Certainly, to the extent that the special nature of the Canadian political system is due to federalism, it is to be expected that the evolution of Canadian public law will be different from that of unitary States. However, the long and complex exegesis in sections 91 and 92 of *The Constitution Act, 1867* reflects a particular awareness of the problems connected with the organization and functioning of federalism. Against this background, it is understandable that the study of the Executive should be somewhat neglected.[44] However, this explanation is only partly correct, since many writers are fully aware of the functioning of this institution, the British, United States and French examples being well known to them.

The second reason concerns the way in which *The Constitution Act, 1867* is drafted. It says nothing about the Government as such, so much so that one has the impression that this institution does not exist in Canadian public law. The only reference is in section 9, which states that executive authority is vested in the Queen.[45] Similarly, it is amazing to discover that the Constitution still says nothing about the office of Prime Minister, when it is well known that this office is the focal point of the institutional structure. Despite certain implicit references made in describing some of the responsibilities assigned to the Queen and the Governor General, a constitutional text of this kind is a poor reflection of the importance and complexity of the Executive in contemporary law. These deficiencies create problems even though Canada relies, for the unwritten parts of its Constitution, on the public law rules of England (Preamble of *The Constitution Act, 1867*), which does not have a written constitution (Jennings, 1976: 33). Unlike countries

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42. Hurtubise, 1966 emphasizes the effective supremacy of the Executive in the operation of institutions. See also: Desjardins, 1966; Ganshof Van Der Meersch and Somerhausen, 1966. See also Lemieux, 1962.

43. In his text on constitutional law, Laskin, 1975 does not discuss the Government or the Executive. Similarly, see Barbeau, 1974; Chevrette and Marx, 1982. In a recent text, Tremblay does not break with this tradition, limiting his discussion of the Executive to the separation of powers and the rule of law (1982: 44, 75). The text by Brun and Tremblay, 1982 also focuses on the separation of powers. Hogg, 1977 is an exception to this, however; in his text, he devotes two chapters to the Government and the Crown.

44. The desire to correct these defects has recently been especially apparent in administrative law. See, in particular, the discussions by Dussault and Borgeat on the structures of the Administration (1984: 61 ff.).

45. That provision is completed by section 11 which states: "There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; ..."

such as the United States and the Federal Republic of Germany, which have a written constitution containing in theory an express statement of the essential provisions, Canada in keeping with its British tradition, has never clearly specified the respective powers of Parliament and the other parts of the machinery of Government. However, constitutional custom and the unwritten rules of the common law cannot wholly compensate for the deficiency. The result has been great uncertainty and confusion as to the legal status of the executive branch, and its powers and immunities have been given over to judicial interpretation which has not erred on the side of clarity. Practical difficulties exist, therefore, in the way of any attempt at a clear and consistent study of the legal status of the Crown and the Administration.

2. The Existence of Subjective Factors

To these obstacles resulting from the nature of the institutional structure must be added considerations that are more a consequence of subjective notions and the socio-political situation. A period of intense liberalism has led, in many countries with British traditions, to a misunderstanding of the notion of State, especially of the administrative and executive functions. This can be seen from the way in which the principles of public law have been taught, since this aspect has been neglected in favour of discussion of the rule of law and the separation of powers. Many writers have been influenced by the Diceyan tradition in public law, so that the Administration and the Executive have all too often been stigmatized. Although Dicey's ideas are no longer accepted by most academic opinion, their influence continues to be felt, as there are so few resolutely modern studies of the executive branch.

While this defect is partly due to the ideological context, more specifically psychological obstacles are also at work. The term "Crown" has a special dimension, the implications of which go well beyond simple attachment to the Monarchy. This term has in itself the effect of a ritual incantation that elevates what is merely an institution to an ethereal plane. The prestige and glamour of the Monarchy inevitably carry over to the Executive, which also becomes a distinct and superior species. It thus acquires an ideological pre-eminence not possible with simple use of the words "Government" and "Executive." Although it cannot be said to have a decisive effect, this irrational dimension of the Crown interferes with calm, pragmatic analysis of its privileges and immunities. Without going as far as to create a sense of awe for a transcendental reality, the term may take on a mythical aura that can be an obstacle to change. This problem has been noted by Mitchell, who mentions that the words "Crown" and "prerogatives" have a feudal ring, the mystical nature of which conceals simple rules, and the real meaning of the latter cannot be directly understood (1964: 223).

The other effect of the word "Crown," just as powerful as the first, is its capacity to obscure what may properly be referred to as the unspoken. What is passed over in silence is just as significant as what is said. Any reference to the Crown, or to its prerogatives and privileges, is a convenient means of drawing a veil over the executive branch, in particular its day-to-day operation. The Administration thus derives a clear

advantage by withdrawing the purely administrative aspect of its activities from view and substituting for it formulas not always fully understood by the ordinary citizen. In some cases this doubt is quite real, since some privileges, forgotten or apparently fallen into disuse, may inconveniently reappear without warning. Such a confusion would be bad enough if citizens were fully aware that they only had an administrative act to deal with. With the Crown, on the other hand, they are confronted with a supra-legal entity to which, for historical reasons, exceptional rules apply based on an overly authoritarian view of the relations between the State and the individual. In this connection, it is worth examining the example of French administrative law, where the term *puissance publique*, an entity similar to that of the Crown, has long been used in a metaphysical sense which has to some extent discredited it (Vedel and Delvolvé, 1982: 65).

The fact that the Government, the Administration, can benefit from a system separate from that of individuals was due, in Victorian England, to a direct reference to the Monarchy, while in France at the same period, reference was made to the idea of the inherent power of the State to command. At the present time, concepts of public or community interest actually account for this exceptional system of law, which places the debate on a completely different level by eliminating any reference to a metaphysical pre-eminence of the State in any form. At this preliminary stage, the Commission considers that it is no longer possible to justify exceptional provisions for the Crown by the idea of an immanent authority or regal privilege. Changes in terminology would assist greatly in changing attitudes. Expressions such as "the Crown," "royal Prerogative" and "privilege" are quite revealing as linguistic phenomena, since they refer to the idea of innate rights and advantages as a consequence of birth or position.[46] Referring simply to the powers and immunities of the Executive and the Administration would facilitate a calmer appraisal of the situation, to some degree removing the ambiguity surrounding the reasons for this exceptional position.[47] From a unitary standpoint, the Commission now intends to adopt the idea of the federal Administration as a guiding principle. Nevertheless, we will continue in this Paper to refer to the concept of the Crown from time to time, when this proves to be necessary for reasons of clarity.

III. Conclusion

This initial discussion of the legal status of the federal Administration is not intended as a complete and exhaustive presentation of the situation; rather, it attempts to make a critical assessment as a means of directing attention to the shortcomings of the existing

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46. The origin of the term "privilege" is the Latin phrase, *Privata lex*, which means a special system of law applicable to private interests.

47. See, to this effect, Markesinis, 1973, who condemns the use of several expressions with reference to the Monarchy. Moreover, this wish for a renewal leads him to define the royal Prerogative without reference to the Crown: "The prerogative is the residue of executive powers, immunities or other attributes which the government possesses without the authority of an Act of Parliament, but which can be withdrawn - expressly or impliedly - by Parliament" (*Id.*: 309). No doubt, new points of view are presented in the direct summoning of the autonomous powers of the Government or the Executive.

system. As can be seen, the principal defects are connected with the absence of a modern and coherent status. The confusion surrounding the concept of the Crown is largely responsible for this failure to adapt to contemporary circumstances. This concept derives from a logic which no longer corresponds to matters of fact and law affecting the status of any modern Administration. It is therefore only one factor, although the most important one, which must be considered in deciding on a new approach. Not only can modernization of the present status of the federal Administration not be limited to the position of the Crown, but in addition, this concept appears to constitute an obstacle by introducing an artificial distinction within that Administration.

This finding is the basis for the Commission's position on a major point. For greater clarity and simplicity, all future reforms we shall make will embrace the entire federal Administration, which will now be treated as a coherent whole. It will now be necessary to think of "the Administration" within a new theoretical framework. We believe it is eminently desirable, for both the public and for governmental bodies themselves, that the federal Administration should be subject to a unitary system.

Although we know more about what the future status of the federal Administration might be, our task is only half complete. At this stage, we still do not know exactly what the nature of this change will be. From a unitary standpoint, the federal Administration could just as well be subject to the rules of private law as to a special system of public law. A methodology of change is therefore necessary.

CHAPTER TWO

Toward a Methodology of Change

In the Continental systems of administrative law (for example, France, Belgium, Italy, the Federal Republic of Germany, the Netherlands), the special nature of the rules applicable to the Administration is taken for granted. History, attitudes and the weight of administrative tradition partly explain the existence of a separate system of law and the presence of mixed or separate jurisdictions. In countries having a British tradition the situation appears to be the reverse, as it is felt that the Administration should not benefit from legal regimes different from those applicable to individuals. Nevertheless, the privileges and immunities of the Crown constitute an exceptional legal system benefitting the Administration. The privileges and immunities found to be associated with the Crown are often comparable to those on the Continent; sometimes, indeed, the Canadian and British Administrations are in a better position than the French Administration. In questions of tortious liability, for example, the federal Administration can lay claim to a complex system of complete or partial immunities. Similarly, the privilege exempting the Crown from application of the laws has no equivalent in continental Europe. There is thus a considerable disparity between theory and practice, which has frustrated the hopes and desires of many generations of Canadian and British lawyers. The complete subjection of the Administration to the rule of law in the broad sense, and even more so, to the general rules of the ordinary law, thus continues to be hypothetical despite efforts made in this direction.

For the purposes of this analysis, the general direction of British and French administrative law seems open to question in several respects. Just as it is an exaggeration to say that the Administration is so distinct and different from the rest of society that it must necessarily enjoy special privileges and a completely separate system of law, it is equally an oversimplification, or even misleading, to say that there is nothing that distinguishes the Administration from the rest of society. To date, even in English-speaking countries, the burden of proof has always been in favour of the Administration, and its privileges have been taken for granted. Adopting a more critical stance, it is worth considering whether this presumption can be reversed and worth determining whether a special, separate system is justified. Such an examination of the special factors affecting the administrative structure should be reconciled with the need to provide more adequate protection for individuals.

For the purposes of a critical assessment, a methodology of change must be formulated embodying a minimum of rationality. The most rigorous and undoubtedly the most unbiased method is to use the objective description of facts. Since, in considering legal

mechanisms, the law traditionally identifies the parties concerned and then analyses their mutual relationships, why not do the same by starting with the fact that the Administration is a relational entity? Its legal status appears to be largely dependent on the nature of the relationships that exist between governmental bodies and private individuals. The first result of this finding of fact, therefore, is that we are led to review whatever is likely to enhance the position of individuals in relation to the State (Section I: *Conditions Favourable to Strengthening Rights of Individuals*), and secondly, to proceed to reconcile them with the intrinsic and special needs of the Administration (Section II: *The Special Nature of Administrative Action*). Only through an analysis of this kind will it be possible to understand the type of right or privilege which should be enjoyed by each of the parties concerned.

I. Conditions Favourable to Strengthening Rights of Individuals

Public law has been overly prone to rely on the existence of a relationship of inequality between the State and the individual. Like the relations which existed between the Monarch and his subjects in medieval society, modern law is largely based on the idea that the State is intrinsically superior to the individual. Even in our time, the phrase "subject of the Crown" still tends to be used as if the Monarch personally enjoyed the *dominatio* (right of suzerainty and ownership over the property and persons of his subjects). This idea of absolute dominion over individuals is also confused with that of sovereignty (the *dominium* of the Later Roman Empire).[48] Although this power is not without limit as it formerly was, it still appears to be the basis of the primacy of the State. Theocratic arguments now tend to be replaced by ideas of public order or general interest, giving the State a special pre-eminence over its "subjects of law."

Nonetheless, despite this long tradition, the direction taken by contemporary law is casting serious doubts on this type of relationship. The general theme of rights of individuals in opposition to the State is now attracting greater interest. The adoption of the *Canadian Charter of Rights and Freedoms* has made it necessary to re-examine the nature of the rights enjoyed by individuals in connection with governmental and administrative action. The need to make the legal status of the Administration consistent with these requirements seems all the more urgent, since the question of the rights of individuals has now become a central concern of administrative law. This area of the law is currently

48. In the Later Roman Empire, there was a transition from the "principate" to the "dominate," with the Emperor ceasing to be the first magistrate in a system which had preserved the external republican forms, and becoming the Prince of a centralized and theocratic State on the oriental model. In such a system, individuals were only "subjects," not "citizens," as the latter term implies rights of a political nature. With the passage of time it can be seen that, in a constitutional Monarchy of the British type, the abstract principle of sovereignty is still confused with the Crown, giving rise to certain ambiguities in legal relations between the Monarch and individuals subject to his authority, which are closely bound up with the weight of historical tradition.

going through an important process of development, attempting to foster the attachment of rights directly to individuals through legislative reform, rather than limiting itself to its traditional concern with judicial review. In order to promote such reform, administrative law must demonstrate an ability to innovate and to adopt new ideas. Analysis of the effect of civil liberties on relations between the Administration and individuals is a good example of this (see Bradley, 1983; Lyon, 1983). It is therefore necessary to widen the discussion and assess the meaning of the varying and somewhat heterogeneous factors affecting the rights of individuals. For the purposes of this Paper, we will consider the requirements of the rule of law, the recent evolution of civil liberties in Canada, the position of individuals in relation to the Administration and the attitude of the courts toward the privileges of the Crown.

A. Contemporary Requirements of the Rule of Law

Despite the definite trend toward strengthening the executive branch, administrative action remains subject to the rule of law. In its classic and liberal sense, this rule states the theoretical monopoly of Parliament and the courts of the power to make binding decisions affecting the rights of individuals. In a more modern sense relating to administrative law, [TRANSLATION] "the rule of law, which is nowhere defined by the legislator, means that in a liberal State the public administration is subject to the law, that is, its actions are governed by the rules of law" (Pépin, 1984: 139) contained primarily in the Constitution, laws and regulations and decisions of the courts. As this fundamental principle has been officially recognized in the Preamble to the Charter (*supra*, note 13), such a requirement can only encourage a restrictive view of the powers and immunities of the Administration. By establishing the subordination of administrative action to rules contained in the law, this principle suggests there is little room for autonomous powers favouring the Executive. Similarly, it is possible to argue that privileges applicable to the Administration as a result of the Crown's legal position are not consistent with the spirit, or indeed the letter, of the rule of law.[49] It is therefore important to examine the place of these powers and immunities enjoyed by the Administration. If interpreted in too absolute a manner, the rule of law could hinder any realistic approach to the executive function.

1. Exclusion of Autonomous Powers

Through the Crown, the Executive can lay claim to a whole series of powers in the area of relations with: Parliament; defence; national security; diplomatic relations; movement of persons into and out of the national territory (the protection of Canadian nationals

49. Reservations of this kind have been expressed by Garant, 1984b.

abroad is entirely within the discretion of the Crown[50]); the conferring of dignities and decorations; appointment to many offices; the right of pardon; and, of course the theory of "act of state."[51] Many British writers consider that these powers are "inherent" inasmuch as the basis for their validity is not in legislation. In Canada, the command of the armed forces is officially recognized by section 15 of *The Constitution Act, 1867*. Similarly, many enactments reformulate these powers of the Crown in precise language, but do not purport to restrict their unlimited and unconditional nature. As examples, sections 683 to 686 of the *Criminal Code* refer to "Her Majesty's royal prerogative of mercy."[52] Section 20 of the *Dry Docks Subsidies Act* contains a provision which clarifies an exceptional right of the Crown: in Canadian ports, warships and other vessels which are the property of Her Majesty are at all times entitled to the use of such docks in priority to any other vessels. Similarly, section 2 of the *War Measures Act* states that a proclamation of Her Majesty shall be conclusive evidence that a state of war exists or has existed, thus referring only implicitly to the existence of the royal Prerogative to issue declarations of war. Such sections are only restatements of pre-existing rights peculiar to the Crown, and cannot in themselves indicate the state of the law on a privilege which may not have been abolished expressly or by necessary implication. As if to reiterate the existence of this rule, the legislator often uses saving provisions to bolster rights of the Crown.[53] The most striking example of this legal safeguarding process is probably subsection 3(6) of the *Crown Liability Act*, which restates and reaffirms the existence of the rule excluding liability by the Crown "... in respect of anything done or omitted in the exercise of ... the prerogative of the Crown ...."[54] For privileges which are passed over in silence by the legislator, such as the power to confer honours and dignities, or the right to claim allegiance and the assistance of individuals in an apprehended invasion of the national territory, reference must be made to the tradition of English public law and the common law.[55]

Despite the theoretical supremacy of Parliament, it is worth noting the importance of the powers retained by the Executive. Many of them are of central importance in the conduct of affairs of State, such as foreign relations and the organization of national

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50. "There is no legal duty on the Crown to afford military protection to British subjects in foreign parts" (L. J. Scrutton in *China Navigation Company Ltd.* v. *Attorney-General*, [1932] 2 K.B. 197, p. 211).

51. See, on these various powers, British commentators such as: de Smith, 1981; Hood Phillips and Jackson, 1978; Lawson and Bentley, 1961; Allen, 1962.

52. On the power of pardon see, in particular, Smith, 1983.

53. See, for example, section 686 of the *Criminal Code*, which provides that: "Nothing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy."

54. This provision states:
    Nothing in this section makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if this section had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute, and, in particular, but without restricting the generality of the foregoing, nothing in this section makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.

55. On allegiance, see Allen, 1962: 51.

defence. It is as if there were a minimum core of powers enjoyed by the Executive. There are sound reasons for thinking that some powers, by their purpose or particular objectives, can belong only to the Executive. Parliament does not have the technical means to administer matters which must be dealt with quickly on a day-to-day basis.

However, there are definite limits which may not be exceeded without calling into question the fundamental requirements of the rule of law. As a matter of general principle, the latter seems to exclude the possibility of independent and separate powers for the Executive. In France, on the other hand, the Constitution of October 4, 1958, gives the Government specific powers. The result is a material distinction between the areas of law and of regulation, with Parliament having a limited jurisdiction (article 34). In constitutional terms, the Government has a power of initiative in certain matters (articles 20 and 21), while for others it ensures that the law is implemented when only general principles are laid down in the latter (articles 34 and 37). In France, therefore, the Executive has independent and exclusive powers based on the Constitution.

In countries with a British tradition, such a concession to the requirements of the executive branch would seem to be an unacceptable infringement on the general sovereignty of Parliament. Appearances to the contrary, the concept of the royal Prerogative leads to similar results in practice, even though the inspiration is obviously different. It is still, one should remember, the basis for an independent regulatory power in the Government's favour, and the latter can thus issue Orders in Council or proclamations without legislative authority,[56] although this power is rarely used. Much more significant is the power of the internal organization of the Administration, which is not derived from the royal Prerogative, and has no express legislative basis.[57] For the purposes of allegedly internal organization and operation, the Administration uses instructions, guidelines, manuals, directives and other similar practices which enable it to alter substantially the state of the law in many cases (Mockle, 1984). The necessities inherent in the effective operation of any modern Administration have thus made differences among Western countries, that were until recently regarded as very significant, more relative.

In fact, therefore, the French and Canadian Governments have similar powers. Where they differ is that, in France, Parliament cannot independently alter the powers given to the Government by the Constitution. In Canada, Parliament is theoretically sovereign and could, by a general statute subject to the Constitution, wipe out all powers and privileges of the Crown at one stroke. The essential difference between the two systems lies in the basis for such powers, since in practice the solutions adopted are very similar.

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56. Mitchell, 1968: 173. On the notion of "Prerogative Orders in Council," see Allen, 1945: 44.

57. On these internal powers, see Dussault and Borgeat, 1984: 294. Despite their considerable importance, the concepts of "internal order" and "internal order measures" have not been the subject of any substantive examination in the countries with British traditions, and in many respects are still completely unknown. Reference must therefore be made to French and German commentators on the subject. See, in particular: de Laubadère, 1983: 351; Côcatre-Zilgien, 1958; Hecquart-Théron, 1981.

This comparison enables us to place the rule of law and the principle of parliamentary supremacy in context. Too absolute a view of these principles would make it impossible to understand the relative functional autonomy of the executive branch. Since the Government, in practice, controls the tabling of draft legislation, it has the final say on the extent of the powers at its disposal. Although the law tends to suggest the contrary by the establishment of principles with absolute effect, it is really the Government, and to some extent the Administration itself which has a rather wide autonomy simply in institutional terms. There are thus functional limits to the supremacy of Parliament and the law, although these principles continue to be the basis for English public law (Dussault, 1967: 312). For want of the power to infringe directly, they do not have such a limiting effect as might appear at first glance. Even in a system which, in theory, regards Parliament as absolutely supreme, the growth of the Executive has still been remarkable. In this context, it is natural to question the place which the powers and immunities of the Crown should have. Other limits need to be found, and they are not clearly apparent just from a general analysis of the rule of law.

2. Search for a Balance

While it is clear that the executive function does not have powers and privileges which form an exclusive domain, this does not suffice to resolve the problems presented in making a fair assessment of the scope and meaning of the rule of law. It must still be satisfactorily determined what place the Executive has in a system based on the rule of law, which on the face of it allows the Executive only a minor role. The degree of expansion of the executive function makes it necessary to find solutions reflecting the relative compatibility of the powers and immunities held by the Government and the Administration, with apparently contradictory rules. As no major crisis exists in the working of the institutional structure, there must be a balance in effect, and this is the result of deliberate moderation and harmonization expressed through two fundamental requirements in which complementarity and what is fair and reasonable are of equal importance.

(a) The Idea of Complementarity

The period between the early eighteenth century and the Second World War was a brilliant one for the British parliamentary system. The conferring of powers and immunities on the Executive was generally regarded as difficult to reconcile with the enhanced role of Parliament, and hence the tendency to reduce them to what was strictly necessary. Accordingly, there appeared to emerge a philosophy opposed to their extension, or even continuance. Is there not, in fact, a contradiction between the continued existence of this attitude derived from the liberal period and the current importance of the executive branch? In view of the fact that the privileges and immunities enjoyed by the Executive through being associated with the Crown's legal position are truly extraordinary, it is as though this political system were based on the supremacy of the executive branch.

In reality, the situation is more complex. This picture gives no indication of the fact that the official institutions, Parliament and the Crown, have simultaneously undergone what must be described, with certain reservations, as a relative decline. With regard to the Crown, the decline of its privileges is in apparent contradiction with the expansion of the Executive. Where Parliament is concerned, it must be admitted that certain matters cannot readily be dealt with by the parliamentary process. Parliament cannot physically handle everything, especially since certain matters cannot be satisfactorily dealt with by a deliberative body. The governmental and administrative process is more flexible and more expeditious; in view of its permanent nature, it adapts to change more easily. By comparison, [TRANSLATION] "the legislative process has certain opposing features: it is not in permanent session, meetings are always numerous and sometimes bicameral, its debates are in public, it has a great deal of legal symbolism and procedural formalism, it is of a cumbrous nature ill-adapted to circumstances, it decides and acts slowly" (Bergeron, 1982: 231). There are thus matters in which there is a certain institutional logic in actions being taken under executive responsibility, which in no way precludes the holding of a debate in Parliament if the opposition wishes to obtain clarifications on steps taken by the Government.

There thus appears to be a definite complementarity between Parliament and the Executive that belies the apparent conflict between those two parties. Within the State, the question is really just one of specialization of functions, which Sieyès states with clarity in his celebrated formula: [TRANSLATION] "Deliberation is the work of many, execution is the work of one,"[58] as in fact the principles of the supremacy of Parliament and the law are not necessarily antithetical to the powers and immunities of the Executive. In 1960, Thorson noted that "[t]he Rule of Law depends not only on the provision of adequate safeguards against abuse of power but also on the existence of effective Government capable of maintaining law and order and of ensuring adequate social and economic conditions of life for the society."[59] The powers of the Executive are consonant with the logic of common law constitutional principles, if their purpose is to give an effective and concrete meaning to certain general directions issued by Parliament. By their very nature, some functions require an appraisal in concrete terms which the Executive can provide more adequately than can Parliament. Government thus occupies a limited field, which without being autonomous and exclusive, nonetheless constitutes an "open field" which the legislator may alter in theory as he sees fit.[60]

While each has an area of specialization peculiar to itself, therefore, the parliamentary and executive functions are closely connected and complementary. In some respects, they even appear to be dependent on each other. Accordingly, any assessment of a federal

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58. On this aspect of the thinking of Sieyès, see Bastid, 1939: 381.

59. Thorson, 1960: 250. This writer in fact adopts the recommendation of the International Commission of Jurists meeting in New Delhi in 1959, which put forward a resolutely modern concept of the rule of law.

60. "The prerogative is the residue of executive powers, immunities or other attributes which the government possesses without the authority of an Act of Parliament, but which can be withdrawn, expressly or impliedly, by Parliament" (Markesinis, 1973: 309).

Administration privilege must take into account the special nature of the powers currently held by the Executive. Such an assessment can only be meaningful if it is also based on the idea of what is "fair and reasonable" in performing the executive function.

(b) The Idea of Reasonable Limit

The principle of supremacy of the law suggests that everyone is subject to the rules contained in the law without distinction. Hence the notion that any exception to the general application of the law must be justified, even if it is in favour of the Government. On this point, Wade states that "[w]hat the Rule of Law requires is that the government should not enjoy unnecessary privileges or exemptions from ordinary law" (1982: 24). That writer considers that any exception to the ordinary law will be primarily a matter of necessity. However, this rule is too rigid, suggesting that an exception may be justified solely by the fact that no other solution can be found. The idea of necessity refers to the concepts of the liberal period, in which administrative action was tolerated only to the extent that it was absolutely necessary. The causes and reasons for administrative action have obviously changed. Necessity then becomes unsuitable as a means of justifying what is no longer affected by an inevitable determinism.

The *Canadian Charter of Rights and Freedoms* contains other points for consideration. In its first section, it states that the rights and freedoms conferred on individuals are "subject only to such reasonable limits prescribed by law ...." The idea of a reasonable limit is left to be defined by the judge and the legislator. Its introduction into Canadian law results in recognition of the principle of proportionality in public law.[61] With this principle, unlike the idea of necessity, an administrative privilege can be judged fair and acceptable by reference to what is measured. This assessment of what is reasonable should, among other things, be based on three specific points.

The reasonable limit is determined, first of all, by the notion of the suitability of the aims sought. Without being essential, a privilege must be such that it will achieve the various objectives of general concern sought by the Administration. An assessment of this kind has already been made by the Supreme Court of Canada in *MacKay*. The court had to determine whether there had been a denial of equality before the law for a serviceman charged with trafficking before a court-martial established pursuant to the *National Defence Act*. This denial of equality rested, in the plaintiff's submission, on the fact that he was subjected to an exceptional proceeding which did not include all the necessary safeguards, and the fact that he should have been prosecuted in the ordinary courts. Speaking for the majority, McIntyre J. justified this exceptional proceeding by virtue of its consistency with the *Canadian Bill of Rights*:

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61. This rule has been recognized in other systems of law. See, in particular: Delpérée and Boucquey-Rémion, 1982; Braibant, 1974. The better to understand the theoretical and practical implications of the first section of the Charter, see in particular, Morel, 1983 who describes a "control of compatibility." See also: Conklin, 1982; Marx, 1982.

> It [the creation of military law] has been done ... rationally, not arbitrarily or capriciously .... [T]he emergence of a body of military law with its judicial tribunals has been made necessary because of the peculiar problems which face the military in the performance of its varied tasks. In my opinion, the recognition of the military as a class within society in respect of which special legislation exists dealing with legal rights and remedies, including special courts and methods of trial, fulfilling as it does a socially desirable objective, does not offend the *Canadian Bill of Rights*. (*MacKay* v. *The Queen*, [1980] 2 S.C.R. 370, pp. 407-408)

This assessment of the appropriateness of an exceptional proceeding was recently restated in determining whether subsection 235(2) of the *Criminal Code* (Breathalyser) was consistent with the provisions of the Charter (*R.* v. *Holman* (1982), 28 C.R. (3d) 378, p. 393). In determining the nature of the "reasonable limit," the court referred to the criteria suggested in relation to due process of law in the *Canadian Bill of Rights* by Rand J. in 1961. These criteria emphasize the ideas of public interest, appropriateness and proportionality between the extent of the exception and the aim sought. For these purposes therefore, the privileges of the Administration may be justified by their public interest objectives.[62] Administrative secrecy provides a good example of this. Is the maintenance of secrecy acceptable in a context in which the operation of many administrative services does not require strict confidentiality in order to achieve public interest objectives? The rules regarding secrecy must therefore be appropriate and suited to the nature of the administrative activities. They do not have to be essential, simply appropriate, allowing a more critical appraisal to be made.

To this appraisal must be added a second point which relates to the notion of seriousness. A privilege should not subject the individuals concerned to excessive hardship in terms of the aims sought by the Administration, or be exorbitant in comparison with the real importance of the results it seeks to achieve. It seems quite clear, in light of this Paper as a whole, that exceptions to the general rule made for the Administration must not exceed the real scope of its activities.

The final point for consideration, in connection with the idea of a reasonable limit, is the existence of measures which can offset the extraordinary nature of exceptional regimes. It is no longer possible, as it was formerly, to give an absolute and complete meaning to a privilege. Especially regarding Crown privileges, many people seem to be convinced that individuals will be better protected by ensuring that the scope of the exception is not too wide. Accordingly, it is felt that an exception should not be proposed without specific safeguards and rules.

This idea of a reasonable limit on the privileges and immunities of the Administration shows that the law is continuing to evolve toward a balance between the legitimate interests of individuals and the necessities of the "public authority" (*puissance publique*) (Dussault and Borgeat, 1982: 661). The existence of a general impetus to claim increased rights and safeguards for individuals in their dealings with the State leaves little doubt as to the

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62. Wade also observes in this regard that "[i]n principle all public authorities should be subject to all normal legal duties and liabilities which are not inconsistent with their governmental functions" (1982: 24).

nature of this balance. Despite this context favourable to the individual, the precise determination of such a balance cannot be made in abstract terms. It is necessary, therefore, to consider more specific points than can be inferred from recent trends in civil liberties.

B. Paramountcy of Liberal Concepts

Recognition of the primacy of the rights of individuals takes the form, first, of a series of measures designed to protect the moral and physical integrity of individuals. These are civil liberties in the most classical sense. This development can also be seen in efforts to ensure legal equality in order to promote the development of the potential of the individual. The combined effect of these two types of law creates a liberal order to which the Government itself tends to be subject as the principal protagonist. The consequences of this situation for the privileges which apply to the federal Administration must therefore be assessed. The extraordinary nature of many of these could conflict with the recognition of many rights and freedoms.

1. Primacy of the Rights of Individuals

The Charter expressly establishes the liberal nature of Canada's political and legal system. In this regard, it appears to be written along classical lines, characterized by the primacy of the individual and the achievements of the liberal revolutions in the last century. It could have been more innovative,[63] by establishing certain economic and social rights: the right to work; the right to form a union; the right to strike; the right to education; the right to health and material security; the right of asylum; and, the right to culture.[64] However, some provisions are tending, if hesitantly, to recognize such rights. Section 36 of the *Constitution Act, 1982* recognizes, or more precisely creates, an obligation on the provincial and federal authorities to promote the well-being of Canadians in order to increase equality of opportunity, further economic development and provide essential public services.[65]

These "new" rights are considered by French academic analysts as second generation by comparison with the first generation civil and political rights recognized by the 1789 *Déclaration des droits de l'homme et du citoyen*. Some writers have recently discussed certain third generation rights: new rights for the *administrés*; the right to nature or the preservation of the natural environment; the right to development; the right of peoples

63. "First, the new Canadian Charter of Rights and Freedoms is not an innovative rights document .... The underlying political philosophy of the Charter is not as modern as that which informs the Universal Declaration of Human Rights, or its progeny" (Whyte, 1982).

64. These rights are given a very clear statement in, for example, the *Préambule de la Constitution française* of October 27, 1946 (this Preamble is still in effect) and in the *Universal Declaration of Human Rights* of December 10, 1948, articles 22 to 27, a document which may be read together with the *International Covenant on Economic, Social and Cultural Rights* of December 16, 1966.

65. On this question of social rights, see: Proulx, 1983; Lebel, 1983.

to free self-determination; the right to control natural resources, and so on (Pelloux, 1981). The Charter remains silent on the point. Does this mean that, in many respects, the Charter has overlooked certain new aspects of civil liberties?

Despite all its importance in Canadian public law, the Charter does not, by itself, indicate the state of civil liberties in Canada. The British concept of civil liberties differs significantly from systems which give greater importance to declarations, proclamations or charters containing fundamental rights and freedoms. In the United Kingdom, the latter are contained in various Acts of Parliament, and so are statutory in nature. Even in these Acts, there is little or no use of solemn proclamations. The British texts are very specific and limited to the listing of various proceedings rather than the adumbration of broad general principles. In actual fact, the "second and third generation" rights are given legislative form in varying degrees.[66] Countries with a British tradition recognize by implication what is elsewhere the subject of express proclamations. The Charter does not purport to be exhaustive, since section 26 guarantees that the recognition of certain rights and freedoms "shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." Similarly, in the United States the non-recognition of economic and social rights in the Constitution does not mean that they have no application (Henkin, 1981: 229; Ginsberg and Lesser, 1981: 238).

The British concept of rights and freedoms, despite its advantage of flexibility, is nonetheless open to question. On account of their purely legislative nature, these rights have only a more limited application. In times of urgency or crisis, they can, with the greatest ease, be suspended. Similarly, as they have no constitutional or supra-legislative effect, they are subject to shifts in the political climate.[67] Doubtless aware of these difficulties, the Canadian authorities wished to break with the British tradition and use a charter of rights and freedoms, with the result that the latter were given appreciable force and effect. This has had certain consequences. By specifying certain rights rather than others, the drafters of the Charter conferred on them a primacy and pre-eminence over any other document.[68] Accordingly, the Canadian approach to civil liberties is

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66. However, this is not a sufficient excuse to justify excluding them from a constitutional charter, as was argued by Chevrette and Marx, 1979: 109.

67. In describing the prevalent situation before the adoption of the Charter, Hogg observed that "[t]he hard fact remained that if a statute plainly took away a civil liberty there was no redress for the injured citizen" (1984: 284-5). This kind of difficulty helped stimulate the interest of Canadian jurists in various foreign experiences based on texts and declarations having supra-legislative authority. Indeed, "[a] bill of rights, entrenched in a constitution which was immune from ordinary legislative change, could protect civil liberties from legislative encroachment" (Hogg, 1983).

68. This supremacy of the Charter (which is, it will be recalled, Part I of the *Constitution Act, 1982*) materializes in Part VII, in subsection 52(1): "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Somewhat strangely, the political circumstances which governed the adoption of the *Constitution Act, 1982* were at the source of introducing a provision which departs from section 33, subsection (1) of which states:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

This provision's compatibility with the principles stated in sections 1 to 52 remains ambiguous at the present time.

primarily the result of the rights contained in the Charter, which must now be regarded as a document of prime importance acting as a foundation. What this document says, or fails to say, thus becomes particularly significant.

While it is a source of satisfaction that many rights have been extended and strengthened by their inclusion in the Charter, on closer examination this progress seems to be more relative than might be thought at first glance. Any specific listing has the effect of giving certain rights precedence over others. A declaration of rights which is not really exhaustive, or somewhat innovative, may lead its drafters to regret that one category of rights is given priority over another. On the other hand, it generally leaves no doubt as to the ideological basis of a particular political and legal system. By its restrictive nature, the Charter makes apparent the real meaning of civil liberties in Canada.

Despite a movement in the direction of the rights "especially necessary for our time," to use the well-known formula of the 1946 French Preamble, the Canadian Charter is primarily the expression of an individualist view of rights. It firmly establishes the traditional political rights dear to liberal thinking: the freedoms of conscience and religion, thought, assembly and association. It also establishes: the right to vote; the right to life, liberty and security of the person; and, the right to freedom of movement. Similarly, various guarantees of a penal nature, specified in sections 8 to 14, establish the primacy of the individual and the inalienability of the rights pertaining to his person. It is characteristic that many sections begin with the formula: "Everyone has the right to ...." One must be careful, however, not to exaggerate the liberal nature of the Charter, since unlike article 17 of the 1789 French *Déclaration*, there is no provision establishing a right of property or any right to security of property.[69] This rather curious fact reinforces the personalism of the Charter, which thus seems to reflect a philosophical outlook which sees the individual, the human being, as the supreme value.

The Canadian concept of civil liberties is thus concerned largely with the assigning of rights affecting the person as an individual.[70] The *Canadian Bill of Rights* in 1960 had already referred expressly in its Preamble to "the dignity and worth of the human person," and the *Canadian Human Rights Act* has also attacked many cases of illicit discrimination. The Charter thus seems to be the extension of an established tradition. The individualist nature of this document has also been emphasized by judicial interpretation which has been concerned with defending the freedoms of individuals (*Québec Association of Protestant School Boards* c. *Le procureur général du Québec*, [1982] C.S.

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69. The possible inclusion of this right in the Charter concerns some members of Parliament (*Le Devoir*, May 3, 1983, p. 3).

70. Although section 28 of the *Interpretation Act* provides that the word "person" includes artificial persons such as corporations, the context appears to indicate that the authors of the Charter had natural persons specifically in mind. The English version reinforces this meaning, since it speaks of an individual in section 15 ("Every individual is equal before and under the law ..."). In English, an individual is a particular person, a human being. As an artificial person, Her Majesty in her executive capacity would therefore appear to be excluded. However, it can be argued that she is also "a natural body," which could make her subject to this provision. In actual fact, this solution cannot be applied since Her Majesty is only a natural person as Monarch, as Head of State, and not as an embodiment of the Crown, where she is regarded as a "corporation sole." See, to this effect, Haggen, 1925: 184.

673, p. 692). However, it is important not to give too absolute and dogmatic a meaning to the idea of the rights of individuals. In keeping with the criterion of a reasonable limit, these should be able to give way before any community interest. *Ex hypothesi*, if the Charter had recognized the right of property and the right to security of property, this would not mean that any public expropriation undertaking would have to be found unlawful on the ground that no community right could deprive an individual of a right granted by the Charter. The rather artificial antithesis between the community and the individual is much more relative than is generally believed. In the spirit of the Charter, therefore, it is more correct to speak of the paramountcy of the rights of individuals and not an absolute primacy, which might suggest that they are inconsistent with the interest of the community.

The Charter thus firmly establishes certain rights which help to strengthen the position of the individual in dealing with the Administration and the State. The rule of equality of treatment is undoubtedly one of the most essential of these safeguards.

2. Quest for Equality of Treatment

This enhancing of the legal effect of the rights of individuals in relation to the State is made still more significant by recognition of the right to equality of treatment. Subsection 15(1) of the Charter provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination ....

The application of this section is perhaps not as clear as might be thought at first. The references made to the individual and to the concept of discrimination may be interpreted in the restrictive sense of denials or infringements limited solely to people's external characteristics (race, language, sex, ethnic group, age, religion and so on).[71] It is thus worth determining whether this provision really has the effect of making the rule of equality generally applicable in Canadian public law, before considering whether the privileges and immunities of the Crown are consistent with the idea of equal application of the law.

(a) The Concept of Equality in Canadian Public Law

The idea of equality is not a novelty in Canadian public law. In 1960, the *Canadian Bill of Rights* expressly recognized in paragraph 1(*b*) "the right of the individual to equality before the law and the protection of the law." This right is in keeping with what is required by the rule of law, since this concept includes the idea that everyone is equal before the law (Chevrette and Marx, 1982: 1205). The idea of primacy and general applicability of the law necessarily implies that, in principle, the latter is the same for

71. Before the adoption of the Charter, problems of equality were analysed from the traditional way of looking at discrimination (Tarnopolsky, 1977).

everyone and that everyone is equal before it. This meaning has not changed since the principle of isonomy was first established in Periclean Athens. Equal application of the law is nothing other than the rule of law itself. The influence of Dicey has been decisive in this area, since the second meaning given by this writer to the rule of law was "legal equality, or ... the universal subjection of all classes to one law administered by the ordinary courts" (1959: 193). Rather strangely, British writers on administrative law do not refer directly to this principle, as if it were not really understood or not fully accepted (Collon, 1971: 75). That is not to say that equality is an idea foreign to British law. Although its existence does not seem to be really established by administrative law, which prefers to refer to the rules of natural justice,[72] it is nevertheless one of the fundamental principles of public law.[73] In Canada, inclusion of this rule in the Constitution leaves no doubt that it really exists. On the contrary, it is the scope and extent of the rule which may give rise to difficulty.

Despite this British origin, the principle of equality still seems like an American import to many, which to some extent explains the tendency to give it a more substantive application. In trying to resolve various problems as to how it applies, courts often refer to American academic analysis and precedent (Chevrette and Marx, 1982: 1205). Without wanting to deny the importance of this approach, however, we should note that in American law, the idea of equality goes well beyond the purely formal meaning which it is clearly given in the British tradition. This could hardly be otherwise, since owing to the anti-slavery origins of the Fourteenth Amendment to the Constitution (1868),[74] the principle of equality was understood and interpreted in the sense of equality of treatment, of the right of all members of the community to enjoy the benefits of the law. The innovative nature of this change was not immediately realized, not at least so far as its implications for the concept of equality itself were concerned. For a long time, among many American jurists, the most commonly accepted idea was that the concept of the "equal protection of the laws" had an essentially racial meaning.[75] It was not until the late forties that the idea of discrimination was extended to religion, language, sex and so on. A clear change was then observed:

> We now know that the equal protection clause was designed to impose upon the states a positive duty to supply protection to all persons in the enjoyment of their natural and inalienable rights, especially life, liberty, and property — and to do so equally. (Tussman and TenBroeck, 1949: 341)

The principle of equality thus lost its essentially anti-discriminatory nature and became a positive obligation on the State to ensure equal rights for all. For this reason, equality has, since 1960, been given a new meaning ("the new equal protection") in the fields

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72. Collon, 1971: 81. A writer such as Garant, however, believes in the existence of a principle of equality in respect of public burdens (1985: 396).

73. This is especially probable, as English public law has never clearly distinguished between constitutional and administrative law. See, in this regard, Distel, 1982: 43.

74. Angell, 1964: 51. For a review of the historical evolution of the concept of equality in American law, see Handlin, 1979.

75. See, in particular, the comments of Mason and Beaney, 1978: 438 ff.

of economic and social legislation.[76] Some American writers have thus come to contrast the idea of formal equality with that of substantive equality (''formal principle of equality versus substantive principles of equality'').[77] Applying a more substantive assessment of equality, a whole body of academic opinion has sought to show that real equality cannot be conceived of without certain forms of discriminatory treatment to strengthen the position of the disadvantaged (''reverse discrimination'') (Goldman, 1979). In the case of substantive equality, one must distinguish between strict equality and differential equality.

However, it is in France that the principle of equality has evolved most rapidly along these modern lines, in relation to control over the legality of administrative actions. This principle is the real basis of French public law, and was recognized in 1789: [TRANSLATION] ''The law ... must be the same for everyone, whether the person protected or the person punished. All citizens are equal in the eyes of the law and are equally eligible for all public dignities, places and employments, depending on their ability'' (*Déclaration des droits de l'homme et du citoyen*, article 6). Since that time it has become firmly established in many areas: equality before the law; equality in respect of public burdens; equality in the public service; equality in benefits; equality in competitions and examinations; equality of users; equality of the sexes; equality of aliens and Frenchmen in relation to fundamental rights (Rivero, 1965; Wolfers, 1971; Delvolvé, 1969; Morange, 1951; Gaudemet, 1974). This principle postulates that everyone who belongs to a similar category must be treated alike, the logical corollary of which is that a similarity should not be drawn between persons who are in different situations (Carbajo, 1981: 177). The French concept is clearly focused on equality of treatment, and the clearest indication of this has been the abolition of privileges of any kind (Perelman, 1977: 329).

The concept of equality has undoubtedly evolved in the direction of international status, since not only is it recognized by the great majority of Western nations, but it has also been given formal status in article 7 of the *Universal Declaration of Human Rights*, which provides that ''[e]veryone is equal before the law and entitled to equal protection of the law without distinction.'' As can be seen, this formula brings together the British, American and French approaches to the matter.

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76. This new meaning receives increasing attention from American jurists and philosophers. See, for example, the special issue of the *Washington University Law Quarterly* (1979) on a programme of conferences organized by the University of Washington Law School with the title *The Quest for Equality*. See, especially, the addresses on the theme *Equality in Basic Needs and Services: Constitutional Right to Subsidy and Sharing*. See also the presentation by Nagel, 1979: 26, which summarizes American law on the point as follows:

> In this conception (basic rights and liberties) the important kinds of equality are equality of political and legal respect, equality of formal treatment by the institutions of society, and equality of liberty from certain kinds of encroachment or interference, either public or private. A second notion, somewhat broader than the first, is equality in the possession of basic rights plus the equal apportionment of certain kinds of *benefits* that are also regarded as basic — perhaps basic medical care, basic education, care for the aged when they are no longer able to work, and fundamental care for children so that they do not grow up undernourished. The third, and by far the broadest notion of equality, is the equal apportionment of benefits of *all* kinds, particularly economic benefits.

See also Winter, 1979.

77. See, in particular, Greenawalt, 1983. The fact that other writers are questioning the value and effectiveness of the principle of equality is the best possible indication of its significance: Westen, 1981-82; 83.

This brief review indicates that the Canadian approach to the principle of equality is an amalgam of foreign solutions. Section 15 of the Charter is not limited to equality before the law, but also states that: "Every individual ... has the right to the equal protection and equal benefit of the law without discrimination ...." This formula adopts the substantive view of the principle of equality, of Franco-American origin. Equality becomes a positive obligation imposed on the legislator and the Administration.

This approach is obviously more onerous than that derived from the United Kingdom, where equality is only one component of the rule of law. The idea of supremacy of the law implies that it is the same for everyone, and an individual cannot avoid its application by relying on the special features of his situation. In this sense, as stated in subsection 15(1) of the Charter, "[e]very individual is equal before and under the law ...." This is clearly the formal approach to equality before the law, which [TRANSLATION] "amounts simply to uniform application of the law to litigants by the Administration and the courts, whatever that law, even at its most manifestly discriminatory" (Proulx, 1980: 512).

Although the Charter is still close to Diceyan concepts of equality, seen from the limiting viewpoint of the rule of law, an important step appears to have been taken. The approach adopted by the Charter seems to go well beyond the narrow limits of uniform application of the law to include the right to equality of treatment in a general sense.[78] Section 15 is [TRANSLATION] "a general equality clause, not limited to the prohibition of certain forms of discrimination" (Brun, 1982: 793). It is thus possible to foresee changes in the direction of a more substantive approach to equality, which is increasingly being required in the common law countries.[79]

This understanding of the application of the principle of equality in Canadian public law is very important in relation to Crown privileges and immunities. Is such an exceptional system of law really consistent with the requirements of equal application of the law to everyone? Does the "right to benefit equally from the law" assume that privileges which stand in the way of equality of treatment for everyone will be abolished? By the idea of equality, Dicey clearly meant that, in the last resort, individuals and the Administration would be subject to the same rules contained in the law (1959: 202). However, is making the Administration subject to the ordinary rule the ultimate consequence of the principle of equality, or should such a deduction rather be regarded as a confusion of radically different concepts?

(b) Application of the Principle of Equality to Law Affecting the Administration

Nothing in the Charter expressly preserves the rights and privileges of the Executive and the Crown. Indeed, subsection 32(1) provides that "[t]his Charter applies ... to the

78. On this widening of the notion of equality see, in particular, Tarnopolsky, 1982 and 1983.

79. For American examples, see: Greenawalt, 1983; Westen, 1981-82; 1983.

Parliament and government of Canada ....''[80] Insofar as the Charter operates as a true charter of relations between the State and individuals, it is quite logical for the Crown to be subject to its provisions. In addition, there is a clear desire to give the Charter ''universal'' effect and general application, the principles stated in it being applicable to all (Gibson, 1982). Does this, therefore, mean that the various components of the executive branch should receive the same treatment as individuals?

Although it is clear that various institutions such as Parliament, the Government and (by extension) the Crown must observe the principle of equality in application of the law, no support can be found for the assumption of a general similarity of treatment between the Administration and the individual. On the contrary, the formal approach so far taken by the Supreme Court provides a basis for justifying the existence of discrimination in the law (Beaudoin, 1975: 714; Samson, 1975; Bourque, 1977). From the standpoint of substantive equality, identical treatment is not necessary for persons who are in different situations. Non-discrimination is applied by categories, by ''reasonable classification,''[81] rather than by strict equality. A difference in treatment may be justified by the absence of a similar situation or by a distinct nature, which surely is precisely the situation of the executive function and the individual. The unequal positions of the parties seem to be acknowledged. Considering its legal nature, the special regimes governing its rights, duties and privileges, its origins and its political dimension, the public interest objectives which it exists to attain, and the purpose of its activities, everything is in favour of a radical distinction between the Administration and private individuals. Does making them subject to the same process as to liability or procedural safeguards not amount to denying the existence of an entity as important as the Crown in its capacity as the holder of the executive power and public authority? Surely its special nature makes the Crown ''incomparable,'' and it could only occupy a distinct and special position created for it alone. Its nature is clearly distinct, since the concept of the Crown refers to the residual powers of the Monarch. While it is now to be under the law, as are all individuals, that does not make its nature similar to the ordinary individual. Its public nature distinguishes it from private persons even though it acts in accordance with the general rules of the common law. In terms of legal categories, public and private law persons cannot be confused, which would appear to justify *a priori* the existence of separate systems governing them. On the face of it, therefore, it would not seem advisable to make the Administration and the individual subject to equality of treatment. From this standpoint, any relation between these two would necessarily be unequal and could only remain so.

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80. In the case dealing with cruise missiles, the Federal Court both at trial and in the Court of Appeal clearly stated, in reliance on subsection 32(1), that the Charter applied to the Government of Canada. A majority of the Court of Appeal concluded that this application of the Charter also covered Government decisions taken under the royal Prerogative (*Operation Dismantle* v. *The Queen*, [1983] 1 F.C. 429; [1983] 1 F.C. 745 (C.A.)).

81. We refer to the criteria used by the American courts in connection with the Fourteenth Amendment. In this regard see: Michelman, 1969-70: 43; Karst, 1977-78. The expression ''reasonable classification'' was used by Laskin C.J. in *MacKay* v. *The Queen*, [1980] 2 S.C.R. 370.

Another important point is that equality is a duty imposed on the State. There can be no discrimination against the State. It simply performs a policing function to check abuses contrary to equality. In many respects, therefore, it may seem quite pointless to discuss making the Crown subject to the principle of equality. Fortunately, the scope of section 15 of the Charter goes beyond the confines of non-discrimination and includes equality of treatment before the law, so that it is legitimate to compare the position of the Administration in relation to the individual in order to determine what is necessary for greater equality of treatment before the law and in the courts. Although equality is a duty imposed mainly on the State, such a comparison is still valid, if only to ensure that the duty is performed.

Although this type of comparison between the Administration and the individual is legitimate, a classical interpretation of section 15 does not lead to the conclusion that a duty exists to subject them to equal treatment. Both the nature of the principle of equality itself and the formal meaning which it is generally given in Canada are against such a conclusion. Since equality cannot be given a general and absolute significance, does this mean that any search for a better balance in relations between the Administration and the individual cannot be based on the principle of equality?

In reality, aside from the limits of the principle of equality, what is most important is the general sense conveyed by this concept. A more flexible understanding of the general direction in which the law is moving indicates that equality of result is gradually becoming the objective. Formal equality is insufficient, since it leads only to control over equal application of the law, regardless of its content. In a more modern sense, therefore, equality is associated with the idea of justice, the idea that all the various components in society should be treated equally unless there are objective reasons for doing otherwise. This trend towards "equalization," egalitarianism, is also justified on grounds of equity, social peace and legal security: a just rule is necessarily the same for everyone, it is strongly argued (Perelman, 1977: 325; Friedrich, 1977). In Canada, the theme of equality has been directly linked with the idea of democracy: "If democracy is considered substantively as well as procedurally, it requires the pursuit of equality as an economic, social, cultural and moral goal" (MacGuigan, 1982: 247). To attain this result, the concept of equality of opportunity is put forward as a means of correcting inequality such as results from "nature" or from social, economic and institutional causes. There is thus a very clear trend towards a more substantive approach to equality, and the latter is given a more material sense. What is significant is that equality can be a method of achieving justice and democracy, by limiting or eradicating objective causes of inequality among the various components of Canadian society, of which the Government is one. An approach designed to promote more egalitarian relations between the authorities which hold privileges and immunities on the one hand, and private individuals on the other, is therefore entirely plausible. This attitude is consistent with the logic of events, since we are witnessing a continuous expansion of the rights, freedoms and safeguards of individuals, so that some counterweight is necessary, if only the idea of civil liberties, which continues to gain strength. As the State actually has considerable power both in fact and in law

through its capacity for unilateral action,[82] some privileges exercised by the Administration are superfluous and directly opposed to the need to improve the situation of the *administrés* (Dussault and Borgeat, 1982: 668).

It can thus be seen that the status of the Administration must be analysed in a resolutely modern sense, in which any exception should be supported by reasons, not taken for granted. The prevailing tendency in contemporary law is to require a justification for any departure from the general rule. This would mean proceeding on the assumption that the federal Administration as a whole has no vested rights, and that it must justify its special status in terms of contemporary realities. The effect of this approach would be to modify traditional analysis considerably, in particular that used in discussing the privileges and immunities of the Crown. In this specific case, exactly the reverse would be true. The necessity for a critical examination means going from the general to the particular. Although the Crown is the outcome of a particular historical process, exceptional rules to accommodate objective differences must be considered. If we were to take the general body of its privileges and immunities together and attempt to demonstrate the inconsistencies, the task would be much more difficult: this Paper would be in grave danger of resembling an assault on a fortress. It is necessary to strike a better balance between the Administration and the individuals by considering more appropriate solutions than can be expected simply by reverting to the general rule. The new directions suggested by the wording of section 15 of the Charter tend toward a flexible and varied interpretation of their mutual relationships. Inherent in the idea of equality is an attempt to find a balance by taking into account the particular nature of all the factors which go to create a special situation.

Equality is always contingent and relative; for a balance to exist, it is not necessary that all the parties concerned be in identical positions. This is especially important as it is not a question, in this case, of restoring a balance in relations between two categories similar in nature. The dialectic of relations between the Administration and the individual is of an exceptional nature and requires original solutions adapted to the respective situations of the parties concerned.[83] To see the truth of this, the present condition of the *administrés* must be examined. In terms of commonly accepted notions as to the efficacy of the ordinary law, their position is surely somewhat singular.

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82. See *infra*, p. 61 ff., for a discussion of the powers of administrative policing and the power of unilateral action.

83. The inegalitarian nature of the relationship between the State and the individual does not admit the reference to the concept of strict equality, but rather that of differential equality or "inegalitarian equality," which only serves to emphasize the continuance of the Aristotelian distinction between arithmetic and geometric equality. The modern view of equality rests on a differentiation, both for the rights themselves and for the legal entities involved. On this relative nature of contemporary equality see, in particular, Goyard, 1977.

C. The Vulnerability of the Individual

Is Canadian administrative law keeping pace with contemporary evolution in relations between the State and the individual? Many deficiencies remain, such as the absence of any legal requirement that reasons be given for administrative decisions, the lack of safeguards regarding execution of judgments against the Administration and the fact that there is no ombudsman at the federal level. Certain discrepancies in the law have clearly resulted from recent transformations in the executive function. This fact may be explained by the liberal context in which administrative law was developed, in response to limited intervention by the State. General principles and the rules of natural justice are no longer as well equipped to deal with an extensive modification of relations between the Administration and the *administrés*. The unqualified faith of some lawyers in the value and effectiveness of judicial review has only further distorted this situation at the expense of the creation of *a priori* rights, which are more flexible and better suited to the nature of ordinary relations between the Administration and the *administré*. The result has been to leave the *administrés* in a vulnerable position in view of the very rapid growth in the benefit-granting function, a vulnerability which some new rights have tended to offset.

1. Rapid Growth of the Benefit-Granting Function

The State has ceased to be simply the provider and guarantor of a liberal order: it is also responsible for performing a host of services which have considerably altered the nature of its functions. In these circumstances, the idea of *puissance publique* can no longer accurately describe the situation. The State cannot now be seen solely in terms of its administrative police function, because the nature of its activities has long since gone beyond merely creating procedures for issuing prohibitions and authorizations. Academic opinion is unanimous in noting the transition from a "Watchdog State" to a "Welfare State."

Is the expression "Welfare State" still relevant to describe these transformations? It was developed to describe the post-War situation and refers to a system of protection and assistance, to the aid of the State; one thinks at once of isolated actions taken to correct a social or economic situation. In reality, matters have gone much further than that. The State has become a vast organization involved in providing services and benefits as well as in planning functions. Its expanded role reflects an impetus towards control and rationalization of the organization of social relations.

> [TRANSLATION]
> It [the State] is increasingly becoming the regulator of development or even, in difficult periods, of decline. It injects large sums of money into industry and finances community projects. It even produces goods and services directly, occupying the field left open by the private sector, competing with it or taking its place. It becomes involved in the creation of public enterprises, either to provide citizens with better access to essential services or advanced technology or to ensure the independence of the domestic market. In this way the State encourages citizens to participate in a community effort. (Dussault and Borgeat, 1984: 12)

The greater the number of services offered, the more the State tends, in reality, to become indistinguishable from the rest of society, and to affect all individuals directly. This has resulted in the transformation of the individuals' relations with the State, with the purely administrative aspect predominating. Changes as to their rights and status also have to be considered to take into account the requirements inherent in this benefit-granting function.

2. Changes in the Individual's Status in Relation to the State

Both in fact and in law, it is the very nature of the relation between individuals and the State which has been transformed in the last two decades. A very clear shift has taken place from a political relation towards a more properly administrative dimension.

The use of the word "citizen" to describe the status of individuals in relation to the State is a very imperfect rendering of the new dimension in their relations. This word refers to a series of rights and duties of a political nature: the right to vote; eligibility for public office; the holding of a passport; and so on.[84] As a grantee, the citizen is primarily a "user" of the Administration, and needs to have rights which are appropriate to this new situation. As compared with the status of the citizen, which has remained almost unchanged, all the progress made in the area of rights and freedoms has been concentrated in the administrative field, which is an indication of the growing importance of the institutional as opposed to the civic aspect. Many Western nations have considered such matters as: an ombudsman; freedom of information and access to administrative documents; reasons for administrative action; non-curial administrative procedures; consultation and participation; a right to privacy and confidentiality; creating rights for users; maintaining "essential" services; simplifying formalities; administrative decentralization; and additional safeguards in judicial proceedings (such as class actions).

All these reforms carried out in a relatively short space of time clearly illustrate the growth of the administrative function. The individual, having only limited rights, is in a weaker position which the Government has tried to improve, so as to make the State "more controlled and more civilized" (Debbasch, 1979). It thus seems quite clear that relations between the State and the individual have become, above all else, relations between the Administration and the user, who is in a position of dependence and vulnerability; attempts have been made to remedy this. Without questioning the relevance and the effectiveness of these reforms, we must say that they are only corrective measures which are eloquent testimony to the limitations of traditional representative democracy in coping with the growth of the Administration. By themselves they cannot remedy the fundamental problems connected with the development of the State. This dependence is due, in part, to the expansion in the functions of the Government into various sectors

84. The reference to "citizens" also has the unfortunate consequence of excluding aliens, individuals who are particularly vulnerable in dealing with the administration.

where the needs of individuals are regarded as essential. Section 36 of the *Constitution Act, 1982* clearly states this responsibility of the State to promote the material well-being of the entire community. The development of economic and social rights is one of the best indications of this. The Administration also considers rightly or wrongly that it should take the initiative in various areas, such as culture, scientific research, economic priorities and industrial objectives, the fight against poverty and inequality, the promotion of new values and so on. While the Government is thus seeking to obtain the material and human resources to innovate, plan and manage, individuals are inevitably left in a position of dependence: nothing can be done without the grant or green light given by the authorities. Quite apart from the political aspect, this phenomenon indicates the importance of the technical and scientific management of society. The result is an increasing complexity reflected in administrative organization and its tools for action, which thereby creates a situation with a tendency to disequilibrium in relations between the Administration and the *administrés*.

While this disequilibrium results mainly from transformations in the administrative function, it is also assisted by other causes inherent in the social and economic condition of individuals. It is impossible not to notice the growing helplessness of the individual in Canadian society. Some very significant portions of the population are faced with isolation, powerlessness and marginalization. This phenomenon appears to be the result of a number of causes linked, for example, to the decline or disintegration of institutions performing a mediating function between the ordinary person and political authority (social clubs, fraternal associations, charitable institutions and religious foundations). Many other factors are also involved: the increase in single-parent families; the weakening of family ties; the economic crisis and unemployment; consumer techniques; and, the division of labour. More and more, the isolated individual is subject to what may conveniently be described as a direct confrontation with the State. Lacking resources and ill-informed, he becomes merely a recipient of welfare, of unemployment benefits or of old age or disability pensions, an applicant for scholarships and loans, a user of "essential" services. This situation should prompt jurists to create legal machinery infused with a new spirit and seeking new objectives.

The legal situation of the Crown is singularly ill-suited to handling this change in their relations. It appears to be the expression of authoritarian concepts based on the submission and subjection of individuals in their relations with the State. In attempting to remedy this legal inferiority, it is necessary to give their rights a new meaning by no longer taking for granted the pre-eminence of public bodies. Formerly, such pre-eminence was often only a somewhat artificial result of an inability to reconcile the idea of special functions for the Administration with the idea of rights and safeguards for individuals. Efforts must be made to avoid perpetuating an absolutist concept of the State by the refusal to take any compensating measures. National interest or reasons of State cannot be used as a facile excuse for evading the need for a critical re-examination.

The courts have been too dependent on a traditional interpretation of the privileges and immunities of the Crown, and have too often merely approved this situation. Despite the emergence of new trends, judicial attitudes are still unsatisfactory on the point, clearly demonstrating the necessity of legislative reform to introduce innovative solutions.

D. Deficiencies of Judicial Review

For some decades, administrative judges in France have been criticized for being too understanding of the operational necessities of the Administration (Mestre, 1974). The same or perhaps greater criticism might be made of judges in Canada in the past. There has been little innovation in the field of Crown privileges and immunities in this century, and judges have retreated behind a traditional interpretation directly favouring the Administration. All too frequently, judges have simply recognized the existence and scope of a privilege, and then have declined to look any further.[85] Tradition also suggests an interpretation favouring the Crown. The rules governing the application of statutes to the Crown in right of Canada provide a good illustration of this, since the Crown is regarded as bound only if there is an express provision to this effect in the statute, or by necessary implication.[86] Where the legislator has been silent on the point, therefore, the courts can speculate as to whether he intended to make the Crown subject to the provisions of a statute. Such speculation is clearly along lines favourable to the Crown, since the judge gives any provisions that may bind it a restrictive interpretation:

> [I]t has long been established in case law that the Crown can only lose its prerogatives under an Act which contains a clear and precise statement to that effect, and that any Act to which a party attempts to ascribe such a result must be interpreted in favour of the Crown and against whoever alleges that it has renounced its prerogatives. (*The Public Service Alliance of Canada* v. *The Canadian Broadcasting Corporation*, [1976] 2 F.C. 145, p. 149)

In case of doubt, the presumption is in favour of the Administration and not the individual: thus, whenever a statute does not clearly specify that it also applies to the Crown, the Administration can rely on this judicial interpretation in directly infringing its contents. The *Eldorado Nuclear* case already referred to (an infringement of Ontario

85. "Prerogative discretionary powers are also absolute in the eyes of the courts, in the sense that once the existence, scope and form of a prerogative power are established to their satisfaction, the courts have disclaimed jurisdiction to review the propriety or adequacy of the grounds upon which it has been exercised" (de Smith, 1981: 137).

86. *Interpretation Act*, section 16. See *supra*, p. 15 ff., our comments on this immunity.

environmental standards), clearly illustrates the fact that the Crown's legal position allows the State to place itself above the law, even for its industrial and commercial enterprises which put it in direct competition with private enterprise.[87]

Fortunately, there is a body of judicial opinion favourable to giving these privileges a restrictive interpretation (Dussault and Patenaude, 1983: 258 ff.). For some years it has been strongly defended by the Supreme Court of Canada, among others. In the *Labrecque* case, Beetz J. noted that modern English law is hostile to the extension of the royal Prerogative and against using the Crown's legal position to explain certain legal relationships. On the same lines, Laskin C.J. noted in a similar case that:

> The law in Canada, in Canadian provinces, as well as in other common law jurisdictions has gone far down the road to establishing a relative equality of legal position as between the Crown and those with whom it deals, too far in my opinion to warrant a reversion to an anachronism. (*Nova Scotia Government Employees Association* v. *The Civil Service Commission of Nova Scotia*, [1981] 1 S.C.R. 211, p. 222)

The anachronism in question was the common law privilege of Her Majesty to dismiss her employees solely at her own discretion. A majority of the Court concluded that a collective agreement had expressly superseded a situation covered by the common law, and the Government had to abide by it.

In the same vein is *Bank of Montreal* v. *Attorney General of the Province of Quebec*, in which the Government of Québec argued that section 49 of the *Bills of Exchange Act* was not applicable to it, as that section required notice of a forged endorsement of a cheque to be given within a year from the date on which the drawer learned of the forged endorsement. This notice was not given, and in doing this the Québec Government relied on the maxim: *nullum tempus occurit Regi*. It also argued that the Crown cannot be liable for the negligence of its officers or employees. These arguments were accepted by the Superior Court and the Court of Appeal in a unanimous judgment which was finally reversed by the Supreme Court, also in a unanimous judgment. The court concluded that the Crown was bound by a banking contract and that in view of this contractual relationship, it was not governed by any special provision in the circumstances. Pratte J. took occasion to note that:

> [S]ubject ... to a limited number of exceptions ..., the rights and prerogatives of the Crown cannot be invoked to limit or alter the terms of a contract, which comprises not only what is expressly provided in it but also everything that normally results from it according to usage or the law. (*Id.*: 574)

As the Supreme Court tends to favour the contractual approach in classifying legal relationships, this decision may, in the long run, have considerable influence in preventing the Crown from using a unilateral and legislative type of status to maintain its privileges against others.

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87. See *supra*, p. 20, a discussion of public enterprises.

Similarly, in a criminal case, *R.* v. *Ouellette*, the Supreme Court had to assess the relevance of the common law rule exempting the Crown from the necessity of paying costs. In a unanimous judgment, the court disputed whether this rule was "as firm and precise as [it is] considered ... to be" (*Id.*: 571), and relied extensively on section 758 of the *Criminal Code* in concluding that in this matter some discretion was left to the judge, a discretion "limited only by what is just and reasonable" (*Id.*: 578).

In another criminal case, the Supreme Court denied the Canadian Broadcasting Corporation the right to rely on its status as an agent of Her Majesty to avoid a charge under the *Criminal Code* (*Canadian Broadcasting Corporation* v. *The Queen*, [1983] 1 S.C.R. 339). Applying the principles stated in the *Langelier* case, the court held that in order to benefit from the traditional immunity of non-applicability of statutes, the CBC had to exercise its powers in a manner consistent with the purposes of the statute, which it had not done when it allowed the showing of a film in breach of the provisions of the *Broadcasting Act* and the regulations made under it. Even more so than the preceding solutions, this decision indicates that the highest court in Canada no longer intends to regard the privileges and immunities of the Crown as having absolute effect, as it formerly did. However, this breakthrough is only relative, if it is read in light of the decision in the *Eldorado Nuclear* case mentioned above. That case raised the same issues, since both of these public enterprises, agents of the Crown, had to answer criminal charges for breaches of certain provisions of the *Combines Investigation Act*. This time, the respondent enterprises were able successfully to maintain the immunity of non-applicability of statutes, since the statute had been drafted in very general terms and the court concluded that they were acting in accordance with the purposes it specified. To the extent that many enabling Acts are drafted in general terms so as to leave organizations and agencies greater freedom of action in achieving objectives of general utility, there is a danger that they will always act in accordance with the law so as to escape the effect of criminal penalties. Therefore, one should not overestimate the progress made by the Supreme Court in this area.

The Federal Court also seems inclined to adopt this sceptical approach toward the privileged status of the Crown, although not without some hesitation, as can be seen from the recent cruise missiles case (*Operation Dismantle* v. *The Queen*, [1983] 1 F.C. 429; [1983] 1 F.C. 745 (C.A.)). The Trial Division allowed an action to be brought for a declaratory judgment that the federal Government's decision on cruise missile testing in Canadian territory was unconstitutional. Although this decision was reversed on appeal on the ground that it was a political question in which the courts could not become involved, it is now likely (subject to any future judgment by the Supreme Court*) that a court will be in a position to determine whether a governmental decision based on the royal Prerogative is consistent with the provisions of the *Canadian Charter of Rights and Freedoms* (de Montigny, 1984: 167; Murphy, 1984).

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* Just as this publication was being sent to press, the Supreme Court confirmed the verdict of the Appeal Division and stated that the powers of the Government in matters of defence are subject to the provisions of the Charter (*Operation Dismantle* v. *The Queen*, May 9, 1985, Supreme Court, No. 18154).

The courts of the various Canadian provinces have also taken this limiting approach to the privileges and immunities of the Crown on several occasions. This trend remains that of a minority, however. For example, in a recent judgment of the Québec Superior Court, *Nei Canada Ltd.* c. *Volcano Ltée*, the judge dismissed a motion to strike a subcontractor's lien registered on a Crown building owned by Hydro-Québec. As privileges can only exist on attachable property, counsel in this case relied on the Crown immunity against any form of forced execution, including seizure.[88] This argument was dismissed in reliance on section 14 of the *Hydro-Québec Act*, which states that performance of this corporation's obligations may be levied on its property, which would make the property attachable, even though the section first mentions that it is owned by the Crown. Just looking at the text, therefore, the Crown's traditional immunity from forced execution may be in doubt. Other bastions which might have been thought invulnerable have also fallen. The best example of these is the injunction: the Supreme Court has admitted that Crown agents can be made subject to an obligation to do or not do something (*Langelier*, [1969] S.C.R. 60). Initially, this rule was limited to cases in which the Administration had acted unlawfully; the courts could then prevent it from doing acts which it was not authorized to do. In the *Asbestos* case, the Québec Court of Appeal went further in this direction by accepting simply a possibility that the statute at issue might be invalid as a basis for allowing an interlocutory injunction to prevent expropriation of the applicant. It will thus suffice to allege illegality or apprehended illegality, in order to make the protection enjoyed by the Crown against this type of action very uncertain.

The courts have sometimes been critical of Crown privileges in the common law provinces. On the matter of non-payment of costs, for example, the Crown has been denied preferential treatment in several cases (*Ferguson*; *Gooliah*; *Thibodeau Express*; *Thomas*). This limiting interpretation may even lead to somewhat surprising results, as in the Ontario case of *Marek* v. *Cieslak*. The Public Trustee of Ontario, required to produce certain documents, refused to do so in reliance on the Crown's traditional immunity which he had as an agent under the *Crown Agency Act*. He was denied this on the ground that the Crown was not a party to the action, which may mean that its special status is applicable only in cases where it is directly involved. In the same way, a 1979 British Columbia Supreme Court case follows the interpretation of Pigeon J. in the *Verreault* case and *obiter* takes a limiting approach to the contractual power of the Crown:

> [T]he Crown is bound by a contract made by an agent within the scope of his apparent authority, even though the contract is not specifically authorized by statute or order in council. (*Clark* v. *R. in Right of British Columbia* (1980), 15 B.C.L.R. 311, p. 318)

However, these few decisions do not substantially alter the state of Anglo-Canadian law on Crown privileges and immunities. For the most part, courts in the common law provinces have continued to give effect to these privileges,[89] although the new views expressed by the Supreme Court may have a considerable impact in the long run.

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88. The immunity of the Crown in right of Canada from seizure before or after judgment is still the rule, as can be seen in two recent cases from Québec: *Brown* c. *Le Collège Manitou*, [1983] C.S. 825; and *Rabeau* c. *Le Collège Manitou*, [1983] C.S. 832.

89. For a recent case in which the Crown was able successfully to assert its privileges and immunities, see *Re Doxtator* (1984), 44 O.R. (2d) 581.

Although this new line of authority seems promising, it is best to avoid at the outset an overly passive approach that prejudges the direction in which judicial supervision will move. Assuming that matters continue on their present course, there will not be any substantial reassessment of existing privileges until after a long and laborious process. Not only does the time needed for such a process seem at odds with the urgency of reform in this area, but there is also the danger that it will eventually lead to piecemeal solutions instead of overall reform. It may be doubted whether judicial interpretation will develop innovative solutions better adapted to the special nature of relations between the Administration and the individual.[90] One may well wonder whether judges, who are still too imbued with private law concepts, will give sufficient consideration to the special requirements of the Administration as an institution which has powers and obligations applicable to it alone. Until recently, this recognition of administrative necessity has consisted in maintaining the privileges and immunities of the Crown.

In all fairness, it must be said that the entire responsibility for this situation does not rest with the judges. The purposes and resources of judicial review are of a different nature and do not exist to redefine the legal status of the federal Administration. It could not be otherwise, since as the result of no academic comment on the subject and the limits imposed by the legislator, the judge often lacks the theoretical tools needed to make major changes. In this sense, it is illusory to believe that a judge can by himself apply praetorian solutions to remedy existing deficiencies. There is little scope for initiatives of this kind in Canadian judicial tradition. While judicial review can apply corrective measures, it cannot provide comprehensive reforms, which are usually the province of the legislator. In view of the importance assumed by law and Parliament in the legal tradition of this country, the legal status of the federal Administration should be governed by a coherent body of legislation. Only a reform of this kind can accommodate the idea of the special nature of the administrative function, which needs to be further developed.

II. The Special Nature of Administrative Action

British public law has clearly evolved in the direction of making the executive branch subject to the general rules of the ordinary law. The origin of this development is essentially historical, since one of the main issues in the conflicts which shook England in the seventeenth century was making the Monarch and his advisers subject to the common law. In the centuries that followed, this impetus to impose rules on royal privileges became a reflex action, so much so that, in our day, any re-examination of the privileges and immunities of the Crown seems to lead inevitably to a return to the general rules of

90. Writers such as Dussault have also not hesitated to question the ability of an ordinary judge to innovate, considering that [TRANSLATION] "his natural caution ... makes him unlikely to discern new solutions for new problems." He deplores in this regard that the courts [TRANSLATION] "have not been able to establish clear rules on judicial review, where there is nevertheless a wide discretion" (Dussault and Patenaude, 1984: 274).

the ordinary law. Both by the nature of its privileges and immunities and by the characteristics of its legal personality, however, the Crown remains a public law entity. Seeking to make it subject to the same legal rules as apply to individuals runs the risk of preventing the development of solutions that are not necessarily determined by the spirit and the machinery of private law. For the purposes of this analysis, such a confusion is not a major obstacle. Our concern here is with the Administration, not with the Crown taken in isolation in its historical context. There is every indication that the traditional approach of public law needs a fundamental rethinking.

There are several reasons in favour of a new type of approach. First, there is the fact that the historical determinism applicable to the evolution of the Crown cannot be confused with the factors affecting and influencing the Administration. The latter is governed by a different logic. Additionally, an analysis of the status of the federal Administration is not really suited to a historico-legal approach. Without denying the weight of history, already mentioned at the beginning of this Paper, one can clearly see that most of the considerations of fact and law determining the nature and the functions of the contemporary Administration are new. A new methodology capable of accommodating the profound changes taking place in the Administration is made necessary, whether by the striking growth of its benefit-granting function or of its planning and management functions. It has changed, and must be thought of in new terms.

The first aspect of this new approach must be a better understanding of the special nature of administrative action. It will only be possible to identify the most suitable legal regime by undertaking an analysis of this kind.

A. Problems in Making Administrative Action Subject to General Rules

For some writers, [TRANSLATION] "to the extent that the State moves beyond the limits of the Watchdog State and becomes the Welfare State, dispensing goods and services, its activity approximates increasingly to that of an individual ..." (Dussault and Borgeat, 1982: 668). Similarly, the Supreme Court recently held that "[t]he more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject" (*Eldorado Nuclear*, [1983] 2 S.C.R. 551, p. 558). The validity of this assumption might ultimately justify making the solutions of the common law or the civil law generally applicable in the area of relations between Government and the individual.

There are many signs pointing in the opposite direction. The Administration is assuming functions and responsibilities which still have no equivalent in the private

sector.[91] This special nature is apparent first from a general review of its functions and second, and more specifically, from the services and benefits offered to individuals. Far from paralyzing any positive development, such an observation favours the emergence of solutions capable of giving more adequate protection to the rights of individuals by taking into account the special features of administrative action.[92]

1. The Existence of Special Functions

In any modernization of the legal status applicable to the Administration, it is essential for future reforms to take account of its specific nature. Since many administrative functions differ significantly from activities governed by private law,[93] the idea of a special legal status for the Administration is not, as such, a strange one. In many cases, it may lead to more satisfactory results than the general system, provided it is not designed to favour the Administration unduly. It is important to begin with the assumption that separate treatment may produce better results because it is better adapted to the objective sought. The farther away Administrative activities are from the process of private law, the more it becomes necessary to devise original solutions. In English public law, recent research has moved in this direction by drawing attention to the impossibility or difficulty of establishing analogies between "the individual relationships" and the Government, the Crown and the State (Winterton, 1983: 410), as in fact all indications are that "special" situations require special rules. This seems particularly true with regard to the maintenance of public order and unilateral action.

(a) The Administrative Police Function

The maintenance of public order accounts for a large part of administrative activities. In Canada, the federal Administration holds vast powers of supervision, seizure, retention, inspection and confiscation which may usefully be taken together to indicate that the

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91. Private law is taken to mean the rules governing relations between artificial and natural private law persons. Anglo-Canadian writers have given some interesting definitions of it: "Private law might be described roughly as that which covers transactions and interactions between individuals, particularly in regard to property, commerce and the family" (Ison, 1976: 799). On a more subtle distinction between public and private law, see Linden, 1976: 833. See also Harlow, 1980.

92. As Ison has observed, "[i]n its substantive rules, public law has developed to a large extent independently of private law. But in its institutional, procedural and conceptual framework, public law is not sufficiently independent: on the contrary, it has suffered from the intrusion of private law" (1976: 824).

93. As Ouellette recently observed, the State [TRANSLATION] "also exercises functions of public power or functions which are properly governmental, the legislative, jurisdictional and administrative functions, in accordance with the three traditional functions of the State, which have no equivalent or counterpart among individuals or in the private sector: individuals are not responsible for implementing statutes, do not administer prisons, do not issue authorizations or licences, and so on" (1985: 50).
In Hogg's writing, the same kind of observation is found:

> The state enjoys extensive powers which are not available to subjects: to collect taxes, to maintain an army, a police force and courts, and to exercise the powers necessary to administer the myriad laws which regulate and provide state services in modern society. In addition, the state enjoys certain privileges or exemptions from the general law of the land. Some of these are necessary to the effective exercise of state powers .... (1977: 163)

nature of the Administration's function falls outside the ordinary law. This function is also exercised through a number of prohibiting and authorizing regimes in all areas of economic and social life. In French administrative law, this function represents the concept of "administrative police."[94] The term "police" is used here to mean the function and not the persons responsible for carrying it out. In the material sense, police means the rational organization of public order through a group of organizations and institutions. Although still generally discounted in the English-speaking countries, this idea is very useful as an accurate description of one of the chief functions of the federal Administration, and there are signs that it is beginning to gain acceptance in Canadian law.[95]

While there is no general theory or completely separate regime for these police activities, the federal Administration has vast powers in this regard. In many areas, it is responsible for maintaining public order, as for example in foreign trade or telecommunications. Since in theory it has a monopoly of the constraint power, it usually discharges this police function by creating exceptional regimes based on authorization or prohibition. Whether these are created by legislation or regulation, it is the Administration which must consider the merits of each particular case, often exercising a wide margin of discretion. The areas so affected are extremely varied, at both the federal and provincial levels: film censorship, liquor and building permits, driver's licences, permits for broadcasting and cable networks, air transport, ambulance operations, the marketing of agricultural products, gaming establishments, the building of dams on waterways and so on. These very diverse examples clearly show that the Administration supervises a large part of economic and social activity.

In exercising this supervisory function, the federal Administration has at its disposal extraordinary powers which do not in any way relate to the legal position of the Crown.

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94. In French administrative law, this concept of administrative policing is very important in determining what falls within the jurisdiction of the administrative judge as opposed to the activities of judicial policing subject to control by the judicial tribunals. As the French administration exercises many policing powers, general or special, with or without legislative authorization, the determination of what may be a subject of this function is also of great significance for control of the legality of administrative action. See, to this effect, Vedel and Delvolvé, 1982: 161. For a recent summary, see Picquart, 1984.

95. See, on this subject, Issalys, who discusses the powers of economic policing exercised by independent administrative agencies (1983: 846). See also Lemieux, who refers to the [TRANSLATION] "various administrative policing regimes progressively established by the State" (1983). It should also be noted that a British writer, Morgan, has actually used the term "police" in the sense in which it is used here, referring in particular to German administrative law: "The term 'Police' (*Polizei*) has a much wider meaning than in England and extends far beyond the preservation of the peace. Its meaning approximates to the term 'police power' as used by the Supreme Court of the United States, *i.e.* 'public health, public morals, public safety' " (introductory chapter to the text of Robinson, 1925: 68).

These are the powers of inspection,[96] search,[97] seizure,[98] detention,[99] confiscation,[100] sale after seizure[101] and even the imposition of a fine[102] or performance by the Administration itself.[103] The nature of all these powers is that they confer exceptional rights which are directly dependent on the will of the legislator alone, and subject to little or no control by the ordinary courts. In practice, therefore, the Administration has some room for discretionary appreciation in deciding whether there has been a breach of official regulations.[104] As this police activity represents essentially a unilateral action, the procedures used depart considerably from the rules of private law. If such procedures are ultimately a source of damages for the individuals concerned, the implementation of the general rules of civil law or common law may lead to many problems. In view of the complexity of police machinery, the proof of a specific fault may prove to be difficult. Additionally, as police activities are more likely than private ones to result in the commission of a slight fault causing serious damage, the courts have often adopted a more cautious stance, requiring proof of bad faith or gross negligence for the Administration to be held liable. Lacking any presumptions in their favour, individuals may then have to discharge a rather heavy burden of proof. A special system of public law would thus place them in a better position in this regard.

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96. See, in particular: section 7 of the *Fish Inspection Act*; section 8 of the *Radiation Emitting Devices Act*; section 7 of the *Feeds Act*; section 63 of the *Canada Labour Code*; section 14 of the *Transportation of Dangerous Goods Act*.

97. See, in particular: section 10 of the *Environmental Contaminants Act*; section 36 of the *Livestock and Livestock Products Act*; section 7 of the *Maple Products Industry Act*; section 11 of the *Motor Vehicle Tire Safety Act*.

98. See, in particular: section 8 of the *Forestry Development and Research Act*; section 8 of the *Pacific Salmon Fisheries Convention Act*; section 19 of the *Animal Contagious Diseases Act*; section 17 of the *National Harbours Board Act*; section 111 of the *Immigration Act, 1976*; section 24 of the *Clean Air Act*.

99. See, in this regard: section 63 of the *Cooperative Credit Associations Act*; section 22 of the *Customs Act*; section 22 of the *Harbour Commissions Act*; section 33 of the *Western Grain Stabilization Act*; section 39 of the *Weights and Measures Act*.

100. See, for example: section 10 of the *Currency and Exchange Act*; sections 173 to 244 of the *Customs Act*; section 21 of the *Excise Act*; section 51 of the *Fisheries Act*; section 6 of the *Hazardous Products Act*; section 52 of the *Yukon Act*.

101. See, in particular: sections 44 and 45 of the *Government Railways Act*; sections 23 and 26 of the *Department of Transport Act*; subsection 381(7) of the *Canada Shipping Act*; section 21 of the *National Harbours Board Act*; section 23 of the *Ocean Dumping Control Act*.

102. See, in this regard, section 20 of the *Anti-Inflation Act* and subsection 26(1.1) of the *Northern Pipeline Act*.

103. See, in particular: sections 6 and 14 of the *Navigable Waters Protection Act*; sections 25 and 27 of the *Telegraphs Act*; subsection 4(2) of the *Wages Liability Act*; section 17 of the *Expropriation Act*; subsection 30(1) of the *Northern Pipeline Act*; section 15 of the *Transportation of Dangerous Goods Act*.

104. This discretionary power is often criticized, as shown by Lareau, 1984 in a recent article.

(b) The Power to Act Unilaterally

In a more general perspective, unilateral action, the characteristic method used by the Administration, involves a whole series of principles which apply only to the Administration. These rules constitute one of the principal bases for the special nature of administrative law.

The unilateral action, whether individual or general, gives the Administration an opportunity to alter the state of the law without the consent of the parties concerned. This procedure has not developed in private law, where in general individuals cannot unilaterally impose their will on others (Tancelin, 1975: 172). Further, the unilateral act does not assume the existence of a prior legal connection, such as a contractual or user relationship. The Administration may unilaterally alter the rights and duties of individuals with whom it has no special relationship. Although there are many conditions on the use of regulations (Dussault and Borgeat, 1984: 452), nevertheless such a procedure is, strictly speaking, extraordinary.

In order to differentiate administrative from private law and thereby confer legitimacy on it, it is sometimes tempting to postulate radical differences between these two areas of the law. The dividing line would depend on the nature of the bilateral and consensual private law act on the one hand, and the unilateral and imperative administrative act on the other. The absolute predominance of the will of one party over the other has often been a means of defining certain fundamental concepts of administrative law. It is thus possible, in the search for a systematic arrangement, to object too strenuously, neglecting to take into account certain factors as a result of which differences between the concepts of contract and unilateral action become extremely tenuous.[105] For example, some acts which have the external appearance of a contract are in fact regulatory processes. Conversely, a regulation may lose a large part of its unilateral nature by becoming subject to approval by those concerned. A method or a process should thus not be associated too exclusively with one area of the law. This is especially true for administrative law, where the technique of contract has always held an important place. On the other hand, it has to be acknowledged that private law is not an area in which many unilateral processes are to be found. These are largely the monopoly of the executive branch, and may thus serve to illustrate the special nature of an institution such as the Administration. Without distorting the complex reality of relations between the Administration and the individual, the ability to act unilaterally does indeed seem to be one of the fundamental characteristics of administrative action.

Relations between the two parties concerned are thus fundamentally unequal. One claims to be acting in the general interest or for public purposes, and so imposes its will unilaterally on the other. It is difficult for private law to accommodate this disequilibrium, since it assumes that the parties are equal. For example, it is difficult to apply the ordinary

105. French administrative law has taken account of this development by formulating the concept of a mixed act. See, in this regard, Madiot, 1971.

rules of tortious liability so as to hold the Government liable for damages resulting from the exercise of regulatory powers. In *Welbridge Holdings Ltd.*, the Supreme Court considered this problem by excluding the regulatory functions of a municipality from the scope of liability (see also, the *Fafard* case). There are thus "public authority acts" (*actes de puissance publique*) for which the Administration enjoys complete immunity (Garant, 1985: 916). Does this mean that the power to command, regulate and take action by authority implies a power to issue orders which cannot be the subject of monetary compensation? Without compromising the freedom of action of governmental bodies, special systems of liability could help to mitigate the undue severity of this rule. This would produce a happy compromise between the necessities inherent in the regulatory function and the no less important necessity of not causing excessive damage to individuals. Such antithetical entities cannot be satisfactorily reconciled within the limits of the ordinary law.

2. The Special Nature of the Benefit-Granting Relationship between the Administration and the Individual

Both by its use of certain legal techniques and by the special nature of its functions, therefore, the Administration may in general be distinguished from the world of private law. Is the same true, at a lower level, of the services and benefits provided by the Administration? Are there not indications of a growing similarity with private enterprise? This parallel is to some extent justified by the use in the Administration of management methods originating in private enterprise. This also reflects a trend towards making the idea of a benefit or service more consistent in circumstances in which some public actions have a more markedly commercial aspect. In a culture geared to mass consumption, having an X-ray taken in a hospital can be like going to the movies. While one can understand this parallel in observing social phenomena, however, there is little basis for its general application in administrative law.

Certain services provided by the Administration are unquestionably industrial and commercial in nature.[106] Petro-Canada is undoubtedly the best illustration of this. Similarly, the Air Canada board of directors "shall have due regard to sound business principles, and in particular the contemplation of profit" (subsection 7(2) of the *Air Canada Act* of 1977). However, these profit-making activities represent only a small part of the Administration's total activities, which are essentially determined by considerations of the general interest, in which profit plays no part. Even in the case of Petro-Canada, the profit role is limited if we consider the "national interest" objectives stated at the beginning of the Act (section 3 of the *Petro-Canada Act*).

In the majority of cases, services and benefits provided by the Administration differ considerably from those provided by private enterprise. Paradoxically, individuals find themselves in the position of creditors to the State. As their rights are often guaranteed

106. See *supra*, p. 20, our comments on public enterprises.

by law, the Administration is in a sense in the position of a debtor, its role being limited to delivering the service on the individual's request. This evolution is made more significant still by the receptiveness of the courts to applications for injunctions by user committees to terminate strikes regarded as illegal. The position of the judges is based on the fact that these persons have very important rights opposing any interruption in operation of the service by a work stoppage.[107] In *The Queen in the right of Canada* v. *The Queen in the right of the Province of Prince Edward Island*, the Federal Court recognized that the federal Government had been in breach of its duties by failing to take the necessary action to provide a ferry service between Prince Edward Island and the mainland.[108] Although this cannot be the basis for a general rule, it would seem, therefore, that users of a public service have rights in relation to the State. This is dealt with in paragraph 36(1)(*c*) of the *Constitution Act, 1982*, which states that "... the government of Canada and the provincial governments, are committed to ... providing essential public services of reasonable quality to all Canadians." The Administration thus has duties which exist independently of any contractual or special relationship.[109]

In the absence of a contract, individuals have no right to require a private enterprise to operate. Even in the case of a monopoly, private enterprise has complete freedom to alter the nature of its activities, just as it may suspend its operations. If a contract is signed, it can often do so if it pays compensation or an indemnity. In many respects, user-consumers have different rights depending on whether the party they are dealing with is private or public.

Despite the formal recognition of certain rights, individuals are still not in a position of equality in their relations with governmental bodies:

> [TRANSLATION]
> Even if the State is in the position of a debtor, it is still the State, and still enjoys the prerogatives of the public authority: it is responsible for deciding on how it will discharge its debt, and may impose its decision on the individual. (Vedel and Rivero, 1980)

In many cases, the Administration does actually have certain options as to the form which the services it provides to the public will take. It has a duty primarily as to the means, not the end result. The most an individual who wishes to obtain a benefit can hope for

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107. In October, 1982, Gonthier J. of the Québec Superior Court authorized a temporary injunction to be issued to end the threat of an illegal strike at the Saint-Charles Borromée Hospital, at the request of the Comité provincial des malades du Québec. This case is similar to one in 1979 involving the same institution, in which an action by patients for leave to sue for damages was also allowed (*Lapointe* c. *Syndicat national des employés de l'Hôpital Saint-Charles Borromée*, [1979] C.S. 1119, affirmed [1980] C.A. 568).
On the obligation to maintain service, see also *Ville de Laval* c. *Fraternité des Policiers de Laval*, April 6, 1981, C.S. de Montréal, No. 81-546. On the rights of recipients of health and social services, see *Poirier* c. *Hôpital du Haut-Richelieu*, [1982] C.S. 511.

108. This finding was based in part on infringement of federal-provincial agreements, and not merely on disregard of the rights of users; however as the purpose of these agreements was to grant a right of way to Prince Edward Islanders, there was really a breach of users' rights. On obtaining damages for interruption of essential services, see Brown and Lemieux, 1979: 790.

109. It is rare that the administration has a privilege excluding liability for a failure to provide a public service. See, for example, section 26 of the *Northern Canada Power Commission Act*.

is that the services will be provided at a suitable level of quality. He can expect that there will be unforeseen modifications as to the personnel responsible, the location and the nature of the equipment used. In addition, he will often have to comply with the internal rules of the department in question, ranging from a simple smoking prohibition to the wearing of special clothing. In order to obtain a service, he may be subject to various constraints, and these internal rules may even be imposed on him away from the premises used by the Administration (this is the case particularly with formalities governing certain requests for material or financial aid). The relationship between the Administration and users can thus be fraught with special requirements without individuals having any real opportunity of consenting to these internal rules. They must obey, in the fullest sense. In a commercial relationship under private law, matters assume a very different aspect. The individual usually has much greater freedom of action as to the business he deals with and the conditions on which the service is provided.

In these circumstances, there are difficulties in analysing the legal relation between the Administration and the user as a contractual relationship.[110] In a similar context, Baudouin has said that, in reality, the freedom to enter into a contract is purely illusory, since the contracting party cannot do without an essential service. This observation leads him to reflect on the fact that the individual may leave [TRANSLATION] "the field of contract and fall into that of the institution or statute" (1983: 53). The conditions on which a public service is provided may not even constitute an offer made by the Administration, as it were, for acceptance by the public.[111] As individuals have no choice in obtaining administrative services, they are in reality placed in a situation governed by the statute and regulation.[112] The meaning and scope of administrative regulation cannot be understood in terms of contract in circumstances where there is an important disparity between the parties. The most recent research suggests that one should now speak of giving the rights of users in relation to the State a public law content (Lajoie, Molinari and Baudouin, 1983: 679).

However, the Supreme Court appears to have ignored this fact, as can be seen in *Labrecque*, where Beetz J., speaking for the court, said that in qualifying

> a given legal relationship in public law, the jurist of the Anglo-Canadian tradition must necessarily carry out this function with the concepts and rules of the ordinary law, unless statute or prerogative require otherwise. ([1980] 2 S.C.R. 1057: 1082)

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110. In French administrative law, the contractual approach is rejected in favour of concepts such as tax and duty. See, in particular, DuBois de Gaudusson, 1977. For a virulent criticism of the contractual approach, see Duguit, 1929.

111. In Québec in particular, academic writers regularly refer to the concept of the standard form contract, in which one of the parties loses the right to negotiate his obligations freely, all the conditions of the contract are imposed on him in advance and his only alternative is to refuse to enter into it. In this regard, see Azard, 1960: 347, who says however that [TRANSLATION] "the standard form contract tends to resemble a regulation." Similarly, see Popovici, 1974: 173 and Crépeau, 1974: 70.

112. A research group at the University of Montréal recently concluded that the right to health and social services [TRANSLATION] "now derives its source from statute, not contract." They noted that [TRANSLATION] "the contractual framework is from a technical standpoint no longer a valid way of explaining the legal relations, since the hospital can now neither refuse to provide care and services nor fail to carry out care and services medically prescribed" (Lajoie, Molinari and Baudouin, 1983: 722).

Although this case concerned the legal status of casual employees in the Québec civil service, and not the nature of a benefit-granting relationship, it is nevertheless symptomatic of an exclusive reliance on the general rules of the ordinary law in making a legal classification of relations between the Administration and the individual.[113] This approach is in fact very questionable. The creation of a system better adapted to the nature of administrative action does not mean strengthening the Administration at the expense of the individual. It simply constitutes a recognition, in law as in fact, that most of the Administration's services and activities differ appreciably from the private sector. Making them subject to the rules of the ordinary law is thus liable to give insufficient attention to many requirements inherent in the organization and functioning of the public sector. In this connection, too much importance should not be placed on legal analysis at the expense of the facts which directly determine a legal relationship. For example, is the contractual approach in *Labrecque* still admissible if the working conditions of employees in the civil service are determined essentially by a unilateral decree, even though the act of hiring a civil service employee still has the outward appearance of a contract?

In relations between the State and the individual, there are still significant disparities for which the existing law provides no remedy. This maladjustment is sometimes the result of a too widespread belief in the ability of the civil law or the general rules of the common law to protect the individual adequately. In order to establish a better balance between the forces concerned, it would be useful to recognize that the Administration is sometimes subject to greater constraints than under the ordinary law. It has to be realized that administrative law offers the Administration both advantages and disadvantages. Thus, [TRANSLATION] "exceptions to the ordinary law are not made in one direction only, but in both directions, opposing each other, plus and minus" (Rivero, 1953: 289). In some cases, the public interest may justify the existence of certain prerogatives, while conversely, benefits granted to private individuals may be denied in other cases. The federal Administration must take into account limitations unknown in private law such as matters involving jurisdictional and procedural rules, for the purposes of administrative action, in management of the public domain, as well as the many budgetary constraints limiting its contractual freedom. In this regard, the special nature of administrative law assumes its full meaning as a reason for creating exceptional regimes to handle situations which are manifestly outside the limits of everyday private relationships.

B. The Advantages of Special Legal Regimes

If this concept of an exceptional system of law is correctly understood, the safeguards available to individuals in dealing with the Administration can be significantly reinforced. The existence of certain specific regimes would provide better safeguards for the rights

113. The Attorney General of Québec had argued, *inter alia*, that "relations between the State and the civil servant are therefore not a contractual nature; they result from a unilateral act of public authority by which the State appoints the civil servant to his position in accordance with previously established general conditions, and thereby confers on him a status which is peculiar to him ...." (*Labrecque*, [1980] 2 S.C.R. 1057, p. 1080). It is interesting to note in the passage this reference to the idea of *puissance publique*, which the English text inadequately translates as "public authority," and which suggests a desire to clarify the exceptional nature of certain means of action available to the administration.

of individuals by providing solutions adapted to their particular situations. This type of solution appears to correspond to recent trends, judging from the adoption in 1982 of the *Garnishment, Attachment and Pension Diversion Act*.[114] In a similar way, to understand better the nature of the reforms which might be considered, it may be worth examining two areas in which the federal Administration still enjoys privileges associated with the legal position of the Crown, those of tortious liability and execution of judgments. The discussions of these two points are only working hypotheses, and as such, are not meant to produce definitive conclusions as to the nature of the changes which could be considered. In addition, to get a better idea of the contemporary significance of special relationships between the Administration and the individual, it seems necessary to go beyond the purely curial area and examine the importance of non-curial guarantees.

1. The Benefits of More Suitable Rules of Tortious Liability

With the adoption of the *Crown Liability Act* in 1953, the maxim "The King can do no wrong" now has only limited application. The traditional immunity of the Crown in this area nonetheless continues in theoretical terms, subject to the modifications made by "the 1953 Act" and the existence of immunity provisions in particular statutes.[115] A general reform better suited to the direction in which contemporary law is moving seems essential. The complexity and confusion which are characteristic of the present situation require that a simpler and more consistent system be adopted.[116] It also seems essential that such a system should be better adapted to certain types of damage or damaging acts for which it is at present difficult to obtain compensation. Among other things, consideration should be given to the possibility of handling applications more rapidly and more simply. On this particular point, it would be better not to rely solely on the good will of the Government in deciding to compensate victims of delicts and quasi-delicts, as provided in the Introduction to Chapter 525 of the *Treasury Board Administrative Policy Manual*:

> When it is considered appropriate as a wholly gratuitous act of benevolence done in the public interest, the government may compensate an employee or other person ... although there is no liability on the part of the Crown to do so.

This procedure is better known as an *ex gratia* payment. It applies particularly to damages for which "the 1953 Act"provides no remedy. Leaving compensation dependent solely on the discretion of the Government is not acceptable for the settlement of actions which may seem justified. This policy offers advantages, however, in achieving an out-of-court settlement to avoid litigation. The existence of an informal practice of this kind shows that there are in fact deficiencies which administrative authorities have tried to remedy.

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114. This legislative reform gives effect to Report 8 of the Commission, entitled *The Exigibility to Attachment of Remuneration Payable by the Crown in Right of Canada* (L.R.C.C., 1977).

115. There are many such immunities in federal statutes (about eighty different provisions). To give only one example, the *Federal Court Act* provides, in subsection 43(7), for complete immunity regarding anything which involves ships owned by the Canadian Government or a province.

116. This was the principal conclusion of the various addresses given at a seminar held in Ottawa in September, 1984, on the extracontractual liability of the Crown. See, in particular, Ouellette, 1985 and Tassé, 1985.

The effectiveness of this practice should first be examined; then the possibility of giving it official status should be considered. A manual cannot in itself constitute a tangible safeguard making such a reform unnecessary.

Making the Administration and the Crown subject to a single system of liability may be considered in various ways. One alternative could be an extension of the ordinary law applicable to private parties. On the other hand, some have argued that [TRANSLATION] "there are situations in which private law solutions are less than adequate" (Côté, 1976: 826). This feeling that the general legal system is not well suited to certain special situations may ultimately result in a more thoroughly modern approach.

The essential principle proposed by "the 1953 Act" is that the Crown should be treated as an individual in connection with the relationship of subordination between master (the Administration responsible for the operation of a department) and servant (the subordinate who is acting in the course of his duties). It is a system of liability based on the concept of individual fault. The damage must have been caused by the negligence of a given person, an officer or public servant. The wrongful act committed by an artificial public law entity thus appears as an individualized event associated with the action or inaction[117] of a particular natural person. This requirement seems to be connected with the fact that the Crown can only act through agents or servants. Some writers have argued that this requirement, that the fault must be the act of an individual, only makes the Crown liable under "the 1953 Act" if its activities can be treated in the same way as those of a private person (Ouellette, 1985). The personalization of the standard of fault is in accordance with accepted theories of liability in private law, which trace the existence of fault to a personal act, the act of another or the act of a thing (Baudouin, 1973; Law, 1982; Lawson and Markesinis, 1982; Linden, 1982). Only in the cases of ownership, occupation, possession or control of property does paragraph 3(1)(*b*) of "the 1953 Act" recognize the principle of direct liability by the Crown.

This depersonalization of the concept of fault, recognized for property, seems to correspond more closely with the nature of administrative activities. Surely the Administration is an organic whole, an institution, an organized body, even more than it is a group of individuals.

This excessive reliance on the direct or indirect action of an individual seems largely inappropriate to the complex and anonymous operations of the contemporary Administration. It is often difficult to establish precisely the identity of the employee who has committed a fault, which often results from a mistake attributable to a whole department. It would therefore be advisable to recognize that it may not be possible to separate a fault physically from the activity of a department, unless the officer or officers responsible for the damaging act can be definitely identified. In this sense, fault would be a failure to perform the obligations of the department: delay, failure of performance, misinformation (Pelletier, 1982); abstention, a deficiency in organization and operations, an error

117. There is an increasing tendency to allow damage suits for governmental inaction, although there is no unanimity on the point. See, in particular, Brown and Lemieux, 1979.

in material operations, the adoption of an illegal decision, illicit actions, the fault of incompetence. It should be weighed objectively with reference to the normal operations of a modern Administration. If it is the department as a whole which has been in error, there is little point in trying to identify the employee responsible by name.

> [TRANSLATION]
> It can be said that an accident is usually the occasional or unforeseeable result of the entire work process, that all those involved are thereby concerned in bringing it about and accordingly in compensating for the resulting injury. There is thus no basis for identifying an individual culprit, apart from exceptional and flagrant cases of spite or sheer negligence.[118] (Donzelot, 1984: 131)

Such a reform would not be a complete novelty, since in any case under the present system it is the Administration which is finally responsible for the wrongful acts of its servants. Logically, the process of historical development begun with "the 1953 Act" should culminate in directly recognizing the responsibility of the Administration alone. To this end, the personal liability of an officer should be limited to cases in which he acts beyond the scope of his duties or, if he has not in fact exceeded the limits of his authority, where he has been clearly and intentionally in breach of the duties of his position. However, there is nothing to prevent the liability of both parties, the Administration and the employee being severally liable for their respective faults.

Such a change would make it possible to simplify liability suits against the Administration and would increase the safeguards available to individuals. It would also be in keeping with the technological and impersonal nature of the contemporary Administration.[119] A recent case offers us a timely opportunity of drawing attention to the advantages that may be expected from this approach.[120] Several businesses in Québec and New Brunswick which were involved in the production and marketing of potatoes recently alleged that they had sustained great damage as the result of an error by Agriculture Canada. After obtaining a certificate of quality from that department, these businesses had mounted an ambitious programme to market a new type of potato. This potato was carefully examined by Agriculture Canada inspectors, and the latter had no hesitation in publicly confirming its quality and superiority. The businesses in question reaped crops of it in the summer of 1980 and 1981. However, in the fall of 1981, Agriculture Canada informed them that the potato had been declassified "because it had a disease producing

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118. In his comments on the legal consequences of misinformation provided by the administration, Pelletier properly canvasses the possibility of [TRANSLATION] "a conclusion that the public administration is at fault once it is possible to objectively establish misconduct in a public department" (1982: 403).

119. In terms of theory, the present system does not clearly express the idea that it is difficult to treat administrative activities as subject to the general rules of the ordinary law. As Dussault observes with regard to the present system, [TRANSLATION] "the complex structure of the administration both federally and in Québec and the nature of its activities, which are often different from those of individuals, have impeded outright application of the private law system of liability as a means of penalizing wrongful and damaging acts by the government" (1974: 1434).

120. An article in *Le Devoir* of April 7, 1983, mentions proceedings for 8.7 million dollars against Agriculture Canada. Although this case is now *sub judice*, it can be used as an example without in any way prejudging the outcome on the merits.

a bacterial wilt which made it unsuitable for potato seeding.'' As the result of statements and articles published in the newspapers, some of these businesses had to close down, and others sustained serious financial losses and damage to their reputation as suppliers. Even so, on several occasions they asked Agriculture Canada to revise its decision. Finally, the department allegedly admitted, long after the financial problems of these businesses had developed, ''that the potato in question was not a carrier of disease and was probably not the one allegedly found to have been affected by the bacterial wilt.''

Even taking the facts alleged as proved, one is left with the possibility that proof of fault attributable to an employee of the department might be long and complex. The departmental units and government employees concerned in the operation of Agriculture Canada are a tangled web not easily unravelled. If *ex hypothesi* fault could really be attributed to Agriculture Canada, what would be the point in sifting the entire operations of the department in order to find the guilty party? Fault is often the work of an entire group, and trying to determine whether it was committed by a laboratory technician, an inspector, an administrative assistant, a consultant, an analyst or a commissioner is then useless. Moreover, it is often difficult to trace the incorrect decision to a particular person. The division of responsibilities and the participation of several hierarchical levels in making the decision often precludes individual assignment of responsibility. In many cases, the making of the decision represents the culmination of a long internal process in which many employees were involved. It is ultimately unimportant whether one or another of them was at fault. In connection with the possibility of reform, therefore, some consideration should be given to the advantages there may be in simply recognizing that there has been a fault, which can be attributed solely to the operations of a departmental unit.

This recognition of the special nature of administrative action could eventually lead to other important reforms. In this regard, it may be advisable to consider making greater use of the idea of no-fault liability based on the concept of risk. Many administrative activities are overwhelmingly larger than private undertakings. We need only mention such large public works as gas and oil pipelines, hydro-electric dams, nuclear reactors, power lines, highways and railways, airports, bridges, port facilities and locks, and so on. Such exceptional undertakings should also include scientific experimentation and everything involving the armed forces. In the various phases of construction and operation of these public works, it is possible without exaggeration to regard them as special and atypical. Their very size is a source of risk. Without there being any fault or negligence on the part of the Administration, they may objectively cause damage because they represent dangerous activities or because they exceed the usual relations between neighbours.[121] For example, the laying of a tunnel in an urban area may unsettle and produce cracks in buildings in an entire district. In such a case, provision could be made for an indemnity based on the idea of fortuitous risk rather than trying to identify fault by the

121. Pelletier observes in this regard [TRANSLATION] ''that the civil law concept of fault is too narrow to cover all possibilities of fault in the public sector'' because ''the modern State has extended its intervention into sectors of activity which are increasingly different from those of individuals'' (1982: 364).

Administration in the quantity of explosives used or in its analysis of the geological structure of the land. Under such a system, it would be recognized that the State engages in activities which create "exceptional" risks.

The basis of the theory of risk is the idea that an activity that generates risk to another makes the perpetrator of the resulting damage liable without it being necessary to consider whether he was at fault.[122] A direct link of cause and effect is established between the damage and the activity in question. It would be a system of objective liability which would be [TRANSLATION] "easier to apply in practice and less onerous for the victim of the damage, who no longer had to prove fault" (Nadeau, 1971: 44). This theory has been given *de facto* recognition by legislation to compensate the victims of industrial and motor vehicle accidents (Baudouin, 1973: 46; Garant, 1985: 886). There is also a measure of social justice in not requiring the victim to bear the burden of an anonymous accident. An improved understanding of the public works concept could lead to greater use of this no-fault liability idea so as to provide better safeguards for individuals. The Administration would thus have to compensate individuals for the exceptional risks to which they are exposed by damage that may occur without any breach of a specific duty.

Although as they stand at present the civil law and the common law make only very limited use of the concept of no-fault liability, the courts have sometimes had to resort to this theory in order to avoid injustice. This occurred in a Québec case where a child was the victim of viral encephalitis, with disastrous consequences, as the result of a vaccination performed by a public health nurse as part of an immunization programme administered by the Government. The Superior Court (reversed in the Court of Appeal) applied the principle of no-fault liability resulting from a situation of necessity in accordance with article 1057 of the *Civil Code*.[123] In particular, the judge observed that in the case of a necessary vaccination from which the community may derive many economic benefits, it is only to be expected that the latter must bear the risks inherent in this kind of operation. The *Manitoba Fisheries Ltd.* case decided by the Supreme Court also appears to take the same approach. Since the *Freshwater Fish Marketing Act* granted a federal body a commercial monopoly in the export of fish from Manitoba, the judges agreed that the appellant should be compensated for the loss of its good will as a result of the passing of this legislation. The court's reasoning was based on the principle that the Government cannot take property without compensation (by analogy with the provisions for compensation following expropriation), which in fact amounted to recognizing a type of liability where the concept of fault is not involved. Although such decisions still carry little weight, the courts are tending to look at the problem of the Government's tortious liability in a new light.

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122. Nadeau, 1971: 43. In common law, this theory exists as well for certain kinds of damages giving rise to strict liability. The landmark case is *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330. See, in particular, the thoughts of Linden (1977).

123. The Supreme Court has recently upheld the decision of the Court of Appeal: *Lapierre* v. *Attorney General of Quebec* (April 4, 1985, No. 18141).

These examples clearly demonstrate that there are fortuitous risks inherent in the normal operations of any modern Administration. Both the concept of individual liability and that of fault seem singularly inappropriate for providing adequate compensation to the victims of certain damage caused in the course of administrative activities. To the extent that such damage occurs in the course of operations which are for the general welfare, it may be argued that as a matter of elementary justice a single individual should not be unduly penalized to benefit the community as a whole. In view of this, serious consideration should be given to the possibility of taking this trend to its logical conclusion. If the concept of fault on an individual basis no longer fully corresponds to the new dimensions of the Government's operations, the creation of a system of universal compensation of the kind which has long existed for accidents in the workplace should be given careful consideration for damage caused in connection with a federal administrative activity. This is an approach which quite naturally forms a part of administrative law, since it undoubtedly requires the creation of a special system which applies much of the machinery of public law. The advantages of the insurance method could thus be used in new ways to remedy the costs and delays of the present system. Such an innovation deserves serious consideration, since with its adoption many types of damage could be covered, including those for which there is still no right to compensation owing to the exercise of the royal Prerogative. Since the "Service State" is primarily an instrument for the transformation of society, its tortious liability should also conform to purposes of the same kind by rapid and inexpensive compensation for damage occasioned in promoting the welfare of the community.

The exact nature of this change is ultimately not important, since even before such considerations the need for a fundamental re-examination is being felt increasingly by the legal community. As Ouellette recently observed:

> [TRANSLATION]
> The time has undoubtedly come to undertake a fundamental analysis of the basis for administrative liability, and to develop a complete and consistent system of public liability ... in keeping with social justice and offering carefully thought out, equitable solutions to the problems of Crown liability and the personal liability of public officers. (1985: 66)

2. Uncertainty Regarding the Execution of Judgments

This expansion of the ordinary rules of liability would definitely be incomplete without a modernization of the rules relating to the execution of judgments. It is one thing to obtain a judgment against the Administration: that judgment must still be carried out. In this area, the Administration, by its association with the position of the Crown, benefits from a much wider immunity than in the area of liability. Subsection 17(1) of "the 1953 Act" provides that "[n]o execution shall issue on a judgment against the Crown ..." (see *supra*, note 115). Section 6 further provides that "[n]othing in this Act authorizes proceedings *in rem* in respect of any claim against the Crown, or the arrest, detention or sale of any Crown ship or aircraft, or of any cargo or other property belonging to the Crown, ..." These provisions were reinforced by subsection 56(5) of the *Federal Court Act*, which provides that "[n]o execution shall issue on a judgment given by the

Court against the Crown." This privilege of non-execution applies specifically to cases of forced execution or execution in kind. It is indirectly reinforced by subsection 17(2) of "the 1953 Act," which essentially leaves the execution of a judgment solely to the discretion of the Administration.[124] In Canadian public law, the execution of a judgment against the Administration in theory remains a rather uncertain matter, although the Government generally abides by the orders of the courts. At this time, it is still very difficult to obtain precise information on the federal Administration's practice regarding the execution of judgments. Although this practice may be regarded as positive, it would be better to embody in legislation what to date is only an intent stated in a circular (see *supra*, p. 64).

From the theoretical standpoint, the non-execution of judgments is actually much more complex. The Administration can counter the verdict of a judge in various ways, without an outright refusal to give effect to his judgment. In particular, it may resort to regularization, either by adopting the vacated act or validating it by legislation. It can also, by dilatory proceedings, unilaterally modify the position of the opposing parties so as to nullify the final judgment. This problem of the "administrative revision" of judgments is attracting more and more interest in academic circles, and many examples are cited both in the United Kingdom and in France (Braibant, 1961; Harlow, 1976). In the particular case of Canada, one suspects that similar practices exist or may have existed (Lemieux, 1981: 160). A recent Federal Court judgment concerning persons whose property was expropriated for Mirabel Airport shows this very clearly (*C.I.A.C.* v. *The Queen*, July 12, 1984, Federal Court of Appeal).

The individual, on the other hand, has only very limited means of response. Among the passive remedies, he can always attempt to rely on the authority of *res judicata* or use a declaratory judgment. He may respond actively by the contempt of court proceeding or by a mandatory or prohibitory injunction, although the availability of such a remedy may be somewhat uncertain as the law stands at present. The latter proceeding demonstrates the incoherence of maintaining the present immunity from execution of judgments. If the courts are increasingly prepared to grant injunctions against the Crown,[125] how can the denial of any form of constraint in the execution of judgments be justified?

Accordingly, some readjustment seems necessary to correct this situation; however, here again, the problem of subjection to the ordinary law is raised with equal force. Some proceedings seem, by nature, to be difficult to apply to the Administration. For example, the recent recognition of the principle of garnishment against the Crown (*Garnishment, Attachment and Pension Diversion Act*) does not really seem to be a major change, in view of the many procedural privileges created in favour of the Crown. Section 18 provides

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124. It states that "[u]pon receipt of a certificate of judgment against the Crown ... the Minister of Finance may authorize the payment ...."

125. Strayer, 1964; Pépin and Ouellette, 1982: 361. See also: *Société Asbestos Ltée* c. *Société nationale de l'amiante*, [1979] C.A. 342; *Bourgault* c. *Société centrale d'hypothèque et de logement*, [1973] C.S. 501; *Association espaces verts du Mont-Rigard* c. *L'honorable Victor Goldbloom*, [1976] C.S. 293; *Le Conseil des Ports Nationaux* v. *Langelier*, [1969] S.C.R. 60.

that "[n]o execution shall issue on a judgment given against Her Majesty in garnishment proceedings permitted by this Part." Similarly, other provisions provide for special delays or formalities benefitting the Crown. Somewhat paradoxically, the abolition of an immunity from execution may be done only by reference to the exceptional and separate nature of the Crown's legal status. Despite its importance and value, this reform is not entirely satisfactory if individuals are still liable to encounter special rules and immunities in asserting this new right. It would seem preferable to revise along modern lines all rules of forced execution against the Crown and administrative bodies associated with it. If the principle of seizure has been recognized, what justification can there be for maintaining other immunities in this area?

The limited nature of the changes introduced by the new Act on garnishment is not an accident. The conviction that the Crown is necessarily different applies most strongly in the area of forced execution and execution in kind. For example, seizure of real property presents considerable practical difficulties besides directly infringing the principle of the inalienability of the public domain used for general purposes. Even from a more modern standpoint, there must be some question as to the advisability of making the Crown and many other administrative bodies subject to forced execution. If their property of all kinds ultimately belongs to the entire community, can even the valid concerns of a single individual prevail over the public interest and the need for the Administration to function effectively? The seizure of movable property of the Administration could paralyze an entire service. The resulting interruption in the operation of a public service could adversely affect other members of the public.

In view of these problems, it appears less than desirable simply to make the Administration subject to the traditional rules of private law governing the execution of judgments. Some thought should therefore be given to creating a specific system along very simple lines. Individuals should not be required to initiate new actions, with all the difficulty and cost that may represent. Some other innovative method of compulsion might be visualized, unlike the usual panoply of forced execution procedures. For example, by the use of a very simple proceeding to obtain a warrant that may be automatically executed against the Consolidated Revenue Fund, the Administration or even the Minister responsible could be ordered to pay a fixed amount for each day of delay in giving effect to the judgment. Such a remedy would be especially appropriate where the Administration was refusing to comply with a judgment directing it to do or not to do something. In the case of orders to pay money, the judgment could be automatically executory. In this regard, the techniques adopted abroad may provide useful alternatives to explore in developing new solutions.

The reforms carried through in France by the law of July 16, 1980 (Baraduc-Bénabent, 1981; Linotte, 1981; Tercinet, 1981) are of undoubted interest, since before that time France was in a situation comparable to that now existing in Canada. Similarly, California seems to be moving towards important reforms in this area, judging from the recent recommendations of that State's Law Revision Commission (California Law Revision Commission, 1980). The other English-speaking countries should also be carefully scrutinized, although at the moment there is nothing to suggest the likelihood of reforms on this matter.

3. The Need for Non-Curial Safeguards

Many privileges and immunities enjoyed by the Administration through the Crown apply only in connection with legal proceedings before the courts. The phrase "Crown proceedings" refers to special rules applicable in the courts. There is thus a real danger that this research will be misled into taking a purely curial viewpoint, related to the legal position of the Crown.

An improvement in relations between the Administration and the individual should not be limited simply to curial safeguards. Judicial review applies only to the smallest part of the general relations between the Administration and the individual. Such relations will ordinarily exist in a non-curial context, as when individuals apply for financial aid in the form of scholarships, loans or grants, and even more obviously in applications for authorization in the form of permits, licences or patents. Similarly, the considerable increase in the volume of benefits granted by the Administration shows the extent of such relations quite apart from any curial considerations. Special regimes adapted to the specific nature of these relations could enhance the rights and safeguards of individuals.[126] A good example is the requirement that reasons be given for decisions affecting a particular individual. This would provide a system subject to administrative law rules specifically, the purpose of which would be to require the Administration to disclose the considerations of fact and law that led to its decisions.

Without anticipating the direction that will be taken by future research on the tortious liability of the Administration, we should note that this area also offers interesting possibilities for rights of a non-curial nature. The United States *Federal Tort Claims Act* emphasizes measures designed to encourage settlement by mutual agreement. These measures precede the start of curial proceedings, which can only begin when negotiations between the administrative body responsible for the damage and the person injured have broken down. By filing an administrative proceeding against the administrative body concerned, the individual can thus expect to save time and money in establishing the merits of his claim. It will also be in the interests of the Administration to arrive at an amicable settlement of the case. This procedure would appear to be very useful for claims limited to small amounts.[127] A non-curial proceeding could thus be more satisfactory than direct resort to the courts, despite the contending interests involved.

The recent evolution of administrative law indicates that this idea of non-curial safeguards is steadily gathering strength. The *Access to Information Act* is certainly the best illustration of this. Creating new rights favouring the individual, this legislation establishes the principles of "open Government," "publication of official documents" and "access to government files." In the same breath, section 3 in the introduction repeals

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126. In other areas of law, there is a growing interest in various nonadversarial ways of resolving disputes. For examples in the consumer/business field, see, in particular, Laboratoire de recherche sur la Justice administrative, 1982: 309-416. Concerning criminal law, see also L.R.C.C., 1975.

127. The American statute imposes no limit on the amount of such claims.

section 41 of the *Federal Court Act*, which stated the rule of administrative secrecy in the courts on the filing of a simple affidavit by a Minister of the Crown. The rules governing disclosure of such documents in the courts have now been replaced by the more general rules contained in the new Act and by sections 36.1 to 36.3 of the *Canada Evidence Act*.[128] The new provisions are based not on the Crown's legal position but on a new system favouring the individual, who can exercise his rights against any federal administrative body without the usual distinction between the latter and the Crown. In section 1 of the introduction, reference is made in the French version to the *Administration fédérale*, [the "Government of Canada" in the English version] which indicates the existence of a new way of looking at federal institutions. With the passage of time and further reform, the Crown must of necessity be progressively merged with the Administration as a whole and encompassed by the new dialectic of relations between the Administration and the individual. It is a rapid process of change, inevitable in the present circumstances.

III. Conclusion

By contrasting divergent interests, this analysis suggested at the outset that the opposing demands would be difficult to reconcile. The first was connected with the liberal nature of the political and legal system in Canada, a system particularly favourable to the protection of the rights and freedoms of the individual. The second resulted from profound changes in the administrative function. Do the things which people expect of the Administration in our day justify the existence of special privileges and rules to allow for the complexity of its activities? On the face of it, there would seem to be a paradox.

This dual nature of the State is not necessarily contradictory. The liberal State does not preclude the planning State, existing to supply benefits and services. A liberal system of rights and safeguards is not in itself an obstacle to the exercise of the benefit-granting function. In particular, they may be reconciled by subordinating state action to certain rules regarded as essential. The instrumental function of the Administration can thus develop without coming into conflict with the liberalism of institutions.

Contrasting with the apparent decline of the legal status of the Crown, there has been a significant growth in the executive and administrative functions, so that it has become necessary to reconcile their particular situation with the need to enhance the safeguards given to the individual. This new departure is all the more necessary since certain privileges traditionally granted to the Crown are not necessarily essential to carry out the various tasks of the Administration. Accordingly, there needs to be a re-examination of existing privileges favouring a return to the general regime of private law,

128. Under these new provisions, any interested person may object to the disclosure of information in a court on grounds of the public interest. The court may overrule an objection of this kind, except as regards "a confidence of the Queen's Privy Council for Canada."

or if circumstances require, a separate system adapted to the special nature of administrative activity. Such an analysis would facilitate a critical examination of the existing situation and leave the greatest possible freedom for assessing new solutions.

The old narrow limits of the Crown's legal status cannot serve to prevent the emergence of a range of safeguards protecting the individual. This expansion to accommodate new rights is in no way a distortion of the traditional position of the Crown, or at least of the way in which it is perceived, since recognition of such rights would be eventually associated with abandonment of the idea of the Crown as an operative concept in administrative law. If that idea were to disappear in the course of unifying the law applicable to the federal Administration, there is no doubt that entirely new systems could be created.

CHAPTER THREE

General Conclusion and Recommendations

Although the primary purpose of this Paper is not to make specific recommendations for change, it nevertheless proposes certain important modifications. In particular, it calls for a change in attitudes. The various points it makes are intended principally to stimulate thought about this problem of the legal status of the federal Administration, by indicating certain new directions in which the reform process can move. The main function of this Paper is to make an often neglected branch of administrative law more relevant to the current situation. In seeking a more modern approach, it attempts to draw attention to the deficiencies and weaknesses in the present situation.

To attain these objectives of increased public awareness and reform, two fundamental points have been examined. The idea of structural disorganization contained in Chapter One was followed in Chapter Two by that of the special legal situation of the parties concerned, the Administration and the individual.

Chapter One was more descriptive and limited to mentioning the internal problems characterizing the federal Administration, without expressly referring to the individual. In particular, it attempted to cast some light on ambiguities inherent in the concept of the Crown and the consequences that follow for the legal status of the federal Administration. To a large extent, the existing problems are due to the weight of historical tradition. The analysis of certain facts and fundamental principles in the evolution of public law in the United Kingdom shows the central importance of the Crown in British institutions, which has led to the existence of curious paradoxes. On account of the survival of the unitary principle, the Crown is more or less associated with all the institutions and functions of the State; this does not facilitate an understanding of the role of this institution for the purposes of administrative law. Similarly, this relational dependence of all the components of the State appears to be a major obstacle to a precise definition of the concept of the Crown.

As this historical determinism does not offer a complete explanation, this Chapter shows that other more specifically Canadian factors also must be taken into consideration. To the problems inherent in any system derived from the British tradition of public law must be added complications peculiar to Canada. Unlike the United Kingdom, Canada has a federal structure and its administrative institutions have been considerably influenced by those in the United States. Federalism is thus at the source of further problems, since there are eleven separate Crowns in Canada, and they nonetheless form a single entity by virtue of the rule that the Crown is indivisible. Administrative institutions seem to be

singularly fragmented as a result of using independent administrative agencies for what are really specifically administrative functions, rather than public corporations which are reserved for industrial and commercial management uses. Some parts of the federal Administration benefit wholly or in part from the special status conferred on the Crown, while others do not. The legal status of the Administration is therefore dualist, and apparently similar situations may often be dealt with in different ways. This differentiation indicates the need seriously to consider applying homogeneous solutions to certain problems found throughout the federal Administration. This new perspective is reinforced by the fact that the legal position of the Crown is not intrinsically any clearer or more consistent than that of the Administration in general.

A re-examination of this kind seems all the more necessary, since under the existing system it is the Administration which is placed in a better position by the Crown's privileges and immunities. By continuing to refer to the Crown, the law obscures the perception of certain contemporary realities and ensures that the role and meaning of these privileges in administrative law will not be readily understandable. The analysis indicates that, in fact, through the legal status of the Crown, the Administration and the Government benefit from exceptional public law rules, the feudal origins of which bear no relation to the complex reality of present-day Canada. Academic analysts, probably influenced by the wording of constitutional documents, have not paid sufficient attention to this phenomenon. Similarly, the existence of more subjective factors associated with the idea of the Crown has contributed to obscuring the real meaning of this institution in administrative law.

It quickly became apparent that the second, more innovative Chapter was necessary. It is not enough to know the deficiencies and inconsistencies in the organization and structures of the Administration. There must also be a means of determining the points which may justify reform, and this does not necessarily emerge from a traditional account of the state of the law. The Administration must now be seen from the standpoint of its external operations, which involve a multiplicity of relations with individuals. The central fact is the mutual relations existing between the two parties concerned, the Administration and the individual, which do not have an identical status in law. Accordingly, this Chapter proposes a methodology for change which rests on a fundamental observation. Unlike private law, where the different parties concerned in theory have the same rights and obligations, public law, and administrative law in particular, are based on a relationship of inequality with many special rules being applicable to the Crown, the Government and the Administration. This is hardly surprising since governing functions (because of their nature) are not encountered in the private sector. The result is a special situation in which there are two clearly distinct classes of subjects of law: Administration on the one hand; and, the *administrés* on the other.

In the first section, the reader was made aware of: the existence of conditions favouring the reinforcement of the rights of individuals; the consequences of the rule of law; directions indicated in the *Canadian Charter of Rights and Freedoms*; the vulnerability of the individual; and, deficiencies of judicial review. First, the rule of law imposes fundamental limits regarding the law applicable to the Crown, in particular by the exclusion of autonomous powers and the idea of reasonableness. Second, the Charter makes

innovations of considerable importance. The general terms in which the document is drafted reinforce the pre-eminent position of rights of the individual. More significantly, the codification in section 15 of the Charter of the principle of equality before the law appears to be the consequence of a philosophy which makes a search for better balanced relations between the State and the individual a probability. Third, this need for a better balance is directly reinforced by an examination in more social terms of the material position of individuals in relation to the State and by an appraisal of certain changes in the administrative function. If the law seeks to provide new safeguards favouring individuals, such as the right to disclosure of administrative records, certain special privileges conferred on public authorities by the legal status of the Crown can without much difficulty be seen as anachronisms. As in Chapter One, the general trends in contemporary law have raised questions as to the privileged status of the Crown. Finally, the nature and extent of judicial review can serve as an argument to reinforce the rights of individuals. Such review has not so far been able to alter substantially the Crown's privileges and immunities. Although occasional progress has been made, such critical appraisal as exists to date has been random rather than part of a general solution. The Paper is careful to state that it is in no way a reflection on judges, since a reform of this importance and scope is usually the responsibility of the legislator.

As if to act as a counterweight to the findings in the first section, the second placed greater emphasis on the special nature of administrative action. The Administration performs many unique functions which have no equivalent in private law relationships, especially with regard to unilateral action and administrative police. Furthermore, the use of private law concepts may seem inadequate to describe correctly the nature of the relations existing between the Administration and its users, particularly with regard to benefits. This recognition of the special nature of administrative action makes possible a more critical analysis of the particular situation of the parties concerned, and at the same time reveals that special rules may be much more able to take their respective interests into account. To illustrate this point, the Paper gave the example of the need to make certain rules more consistent with the complexity and special considerations inherent in relations between the State and the individual. In the field of tortious liability, simply applying the general rules of private law could be a serious obstacle to reinforcing individuals' rights, and at the same time would discount the special nature of administrative activities. Similarly, where execution of judgments is concerned, replacing the immunity at present enjoyed by the Crown by a more direct recourse to the ordinary rules of private law governing forced execution proceedings would create problems. Here again, intermediate or subtler solutions deserve to be seriously examined.

Finally, as this Working Paper is concerned with the legal status of the federal Administration, the last point made in Chapter Two warned the reader that a reform limited solely to the privileges and immunities of the Crown cannot suffice, since these privileges and immunities cannot by themselves account for all the problems relating to the status of the federal Administration. It therefore seems necessary to go beyond the existing situation, if only to support non-curial safeguards for individuals, which seem particularly relevant in light of developments affecting relations between the State and the individual.

In general, therefore, Chapter Two was concerned with this complex question of relations between the Administration and the *administré*. In their legal and material positions, their respective interests and the aims they set out to achieve, these two protagonists appear to be fundamentally different. This awareness of the special nature of the parties concerned does not lead to an impasse. On the contrary, it favours the emergence of a better balance in law between the Administration and the *administré*, since any reform should take into account the special features of their situation. The legitimate reinforcement of the rights of the individual is complemented by a concern not to discount the special nature of the Administration and its operational requirements. The objective is to ensure a proper balance between the two.

This Paper thus presents a somewhat original analysis of the Administration itself and the nature of its relations with individuals. This new approach can best be stated in the form of certain specific recommendations. In broad outline, these are as follows.

1. **As matters stand at present, the differences in status existing between "the Administration associated with the Crown" and the part of it which is not associated with the Crown no longer corresponds to the direction in which contemporary law is moving. Looking to the future, any reform of the legal status of the federal Administration should be based on making that status unified. For administrative law purposes, the concept of the federal Administration is what must now be considered.**

2. **The legal status of the federal Administration must reflect a better balance in relations between the Administration and the individuals. The concept of equality adopted by the Charter appears to be one of the most important components of a critical re-examination of the present status of the Administration.**

3. **In most cases, this better balance is more likely to be achieved through special public law (administrative law) rules. However, in cases where the nature of the Administration-individual relationship does not justify a set of special rules, the rights and obligations of the two parties should be governed by private law.**

4. **The re-examination of the legal status of the federal Administration should not be confined to the usual approach of the Crown's privileges and immunities; rather, it should be along new lines, covering a wider range of non-curial safeguards in favour of the individual.**

5. **In the same way, the general philosophy reflected in this document encourages the development of new ideas, especially in the area of the tortious liability of the federal Administration. It will now be necessary to examine the benefits which may result from the introduction or extension of concepts such as "service fault" or liability based on risk, or from the creation of a no-fault compensatory system based on the availability of insurance.**

Taking these recommendations in order, the Commission bases its position more specifically on the following reasons.

Unification of Legal Status

In the course of identifying more modern solutions, it was hard for us to avoid dealing with the fundamental problem of unity of the federal Administration's legal status. Divided as it is into services which are associated wholly or in part with the legal position of the Crown, the general rules of private law or special rules of legislative origin, the status of this Administration suffers from a lack of coherence which is the source of extremely complex problems. This fragmentation is especially questionable as, in many cases, it does not correspond to the real nature of the activities in question. For example, we have found that many public enterprises engaged in activities of a commercial and industrial nature benefit from Crown privileges and immunities, while other bodies, which exist essentially for public interest purposes, cannot claim such status. These disparities in status show clearly that the association of many administrative bodies with the Crown's exceptional status has been determined not by functional choices but by subjective preferences which have distorted the primary meaning of this special status. If the Government is to go into business, it is hard to justify its assuming privileges and immunities which were originally intended for other purposes. A move must therefore be made towards a legal status which is more in keeping with the real nature of the administrative activities concerned.

This new approach has led us to propose unifying the legal status of the federal Administration. In order to make this status coherent and in keeping with present-day necessities, *we recommend abandoning the distinction that currently exists between those parts of the Administration that benefit from the legal regime of the Crown and those that do not. The notion of "Administration" would then replace the concept of the "Crown" for the purposes of administrative law*, as the former assumes the existence of specific rules that are the subject of administrative law. The status of the federal Administration would then be dealt with primarily in the Constitution and statutes passed by Parliament, not in prerogatives derived from the common law tradition. Although the concept of the Crown would cease to be relevant in administrative law, it would retain its importance in constitutional law in identifying the Head of State, explaining the independent basis of certain powers exercised by the Executive and analysing certain more general aspects of public law. It would be reduced to its primary function relating to constitutional law alone, and would probably thereby be better understood as one of the many institutions of the State.

This concern for unification is not a sudden rejection of existing categories. It is only a possibility for the time being, as studies will be needed to implement it. For example, it would be desirable for a reform of the rules regarding the Crown's tortious liability to apply throughout the federal Administration. The concern for unification is already a tangible reality in recent federal statutes (*Access to Information Act*, section 2), which reflects a fundamental change. To some extent, all of Administration is confronted

with problems which take a similar form nearly everywhere; thus, comprehensive solutions must be considered for reasons of clarity, effectiveness and economy. Administrative law can only be properly understood if it is contained in simple and coherent rules. In the long run, the present importance of the Crown will gradually be replaced by a true legal status for the federal Administration.

Moreover, this renewed vision of the federal Administration will not mean abandoning all existing rules, principles or categories. Many of these will eventually find a justification or basis in the more functional rules which we are proposing. Some provisions of existing law may thus be made part of a more rational system.

The idea of making the legal position of the federal Administration subject to a coherent body of legislation is worthy of serious consideration. By it, certain fundamental principles of Canadian public law, in particular the rule of law and parliamentary control over administrative action, could be given their full meaning once again. Recent trends in the law suggest that it is desirable, and even urgently necessary, for the federal Parliament to have better control over the federal Administration.[129]

The Search for a Better Balance

A new approach will make it possible to look at the privileges and immunities now held by the federal Administration, with or without the Crown, from a different standpoint. Our concern will now be a functional one, in which *the principal objective will be a search for a better balance between the Administration and the individual.* There is a growing consensus that *individuals have certain fundamental rights in dealing with the State.* It is thus an appropriate time for these rights to be redefined. Since the general direction of the law is towards the establishment of a group of civil liberties favouring a better legal balance between the State and the individual, *it therefore seems legitimate to retain only the privileges and immunities needed to perform the usual duties of the executive branch.* However, the inherent requirements of effective operation of any modern Administration should not be denied or disregarded. Even if the public interest should not be used as a ready means of denying or obliterating rights, it has to prevail in some cases; it is all a question of proportion.

The Concern of Administrative Law with Protecting and Enhancing the Rights of Individuals

In view of the special features of this situation and the complexity of the rights involved, it appears that the search for a balance will necessarily lead to special rules of public law. We are no longer dealing here with private law relationships where the parties concerned have the same rights and obligations. For this reason, the Commission expects that a return to the general regime of the common law or the civil law is not necessarily

129. See, in particular the conclusions of Working Paper 25 (L.R.C.C., 1980), and the recommendations of the forthcoming Report (*Id.*, 1985).

the best solution. To date only this alternative has been supported. To stimulate thought on this subject, we have devoted particular attention to the advantages of special regimes in protecting individuals more adequately in their dealings with the Administration. This analysis suggests that *the general rules of the common law or the civil law are not always able to provide such adequate protection for the interests of individuals. We therefore recognize as a general principle that administrative law possesses special characteristics which render it a preferred method for elaborating certain legal regimes likely to improve safeguards for individuals in the special context of their relations with the Administration. In other words, administrative law is better able to protect individuals because it is better adapted to the special nature of relations between the Administration and the individual.* Recognition of this fact does not mean that private law solutions must be rejected. On the contrary, *we recognize the necessity for the general application of private law in certain situations, particularly where the Administration is engaged in activities of an industrial or commercial nature.* In this specific case, as in others, complete or partial application of the general rules of private law may be seriously considered. The private/public law dilemma thus appears to be contingent or relative: the reciprocal interests of the two parties concerned may at times be better reconciled by special rules adapted to the particular nature of their relationships, while in other cases a return to the general rules of private law creates no major obstacles.

The Search for New Solutions

Finally, this Paper suggests that a re-examination of the privileges and immunities of the federal Administration cannot be properly carried out by reference to the considerations which to date have always been used to analyse the legal position of the Crown. Such considerations are too influenced by the past, and do not allow completely new factors (such as the Charter) to be taken into account. Disregarding such factors would make consideration of changes in contemporary law and the world around it impossible. *An analysis confined to the usual approach of the Crown's privileges and immunities therefore could not lead to satisfactory results.* There has to be a recognition that *the Crown is only one aspect of the matter*, the most important but not the only one. Seeking to resolve the legal status of the federal Administration by considering only the Crown's privileges and immunities would be misguided. Historical analysis has shown that the Crown and the Administration are two concepts which have never completely coincided. Expanding the discussion is made more necessary by the fact that *the position of the Crown is too exclusively concerned with formulating curial rules. These parameters should be expanded in favour of a wider range of non-curial safeguards in favour of the individual.*

Modernization of Tort Liability Rules

In adopting the *Crown Liability Act* in 1953, the legislator defined for a large part of the federal Administration a tortious liability system based essentially on the rules of private law. By thus treating the activities of the Administration as similar to those of natural persons, the legislator created a system which does not appear capable of adapting to the transformations currently taking place in the administrative area. Accordingly, it

has become necessary to rethink extensively this area of the law in order to ensure that the special nature of administrative functions is taken into account. This might eventually lead to recommending that coverage be provided for certain types of damage for which the existing law makes no effort to compensate. The range of new possibilities which must now be seriously examined includes the introduction or extension of concepts such as "service fault" and liability based on the theory of risk. Similarly, consideration should be given to the benefits which might result from creating a no-fault compensatory system as now exists in the fields of workmen's compensation and automobile insurance.

To conclude, there are two fundamental reasons in favour of re-examining the present situation. The first is of a structural nature, considering the weaknesses and inconsistencies of the present system (internal aspects mentioned in Chapter One). The second is functional in nature, considering the general trends in public law and the relations between the Administration and the individual (external aspects dealt with in Chapter Two). In this Working Paper, certain points recur and form a backdrop. *Chief among these* various themes *are the ideas of clarification and modernization, a sense of general considerations and the search for a better balance. Nevertheless, the idea which is paramount in this re-examination is that of adaptation to the special relations between the Administration and the individuals.*

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